SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1186

TODD G. MOXEY, *Petitioner*

v.

EDGAR C. SEELY, JR.

and

SECRETARY OF DEFENSE, *Respondents*

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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OPINIONS BELOW

The opinion of the district court in support of its order granting the respondent's motion for summary judgment is unreported, and appears at pages A44-A53 of the appendix to this petition. The judgment order of the Third Circuit Court of Appeals, affirming the district court's decision, is reflected at 485 F.2d 680 (table) and appears at pages A55-A56 of the appendix to this petition.

JURISDICTION

The judgment of the Third Circuit Court of Appeals was entered on October 11, 1973; a timely petition for rehearing was denied on November 7, 1973. The jurisdiction of this Court is invoked pursuant 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. What is the scope of the federal courts' power to review the actions of the military in subjecting a reservist to up-to-two years of involuntary active duty for alleged unsatisfactory participation?

2. Was the petitioner's constitutional right to procedural Due Process violated—

A. by reason of the military's rejection of his specific request to see and respond to the adverse reports placed in his appeal file?

B. by reason of the military's failure to adhere to the hearing requirements of AR 15-6 which were applicable at the time petitioner filed his administrative appeal?

C. by reason of the failure of the Army Appeal Board to give the petitioner's case meaningful consideration, as well as by its use of "canned" findings of fact?

3. Does the fact that the military has available to it two different, and far less punitive, methods for dealing with a reservist who allegedly participates in an unsatisfactory manner render unconstitutional the use of the up-to-two-year involuntary activation method?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

a. *U. S. Constitution, Amendment V*: "No person shall be . . . deprived of life, liberty, or property, without due process of law;"

b. *10 U.S.C. §673a, Ready Reserve: members not assigned to, or participating satisfactorily in, units*

(a) Notwithstanding any other provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who—

(1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve;

(2) has not fulfilled his statutory reserve obligation; and

(3) has not served on active duty for a total of 24 months.

c. Army Regulation (AR) 135-91, ¶¶12, 20

STATEMENT OF THE CASE

This action was commenced on October 26, 1971, by the petitioner, a member of the United States Army Reserves, seeking relief from an order directing him to perform involuntary active duty for sixteen months.

The case was disposed of by the district court's grant of the respondent's motion for summary judgment. In its opinion in support of that action, the district judge totally ignored several substantial issues presented by the complaint; and with regard to the issues dealt with in the opinion, seriously misconstrued and misapplied decisions of this Court dealing with the proper application of constitutional rights in the military. On appeal, the Third Circuit affirmed without opinion and denied a petition for rehearing.

FACTS

"Plaintiff enlisted in the Army Reserves on February 18, 1966. He served on active duty for six months in 1966, and thereafter, fulfilled the required weekend and summer camp assignments. Plaintiff was due to be discharged from the reserves in February, 1972." (Complaint, ¶6). The basis for the activation order was the accrual by the petitioner of "five or more unexcused absences from scheduled unit training assemblies",[1] as follows:

Sunday	January 10, 1971	two
Saturday	February 13, 1971	two
Sunday	February 14, 1971	two
		six

The petitioner was in fact absent from the two drills held on January 10, 1971; however, he had a "severe cold, as a result of which he could not attend the training sessions

1. AR 135-91, ¶12. See the opinion of the district court at page A47 of the Appendix.

. . ." (Complaint ¶10). "On February 13, 1971, Major Charles E. Mahan, Executive Officer of the plaintiff's Army Reserve unit, stated to the plaintiff that he, Mahan, believed that the plaintiff was in fact sick and unable to attend the unit's training sessions on January 10, 1971." (Request for Admission No. 1). Nevertheless, the plaintiff was charged with unexcused absences for the two drills held on January 10, 1971. The respondents have admitted that "no hearing was ever afforded plaintiff" concerning his claim that he should have been given excused absences for the two drills held on January 10, 1971.

Plaintiff did attend the four February drills on the 13th and 14th, but was given an unexcused absence *for each drill* because his uniform was at the cleaners. This resulted from the fact that when the plaintiff called the unit's headquarters, he was erroneously advised that the February drills were scheduled for the 20th and 21st.

Following various procedures which will be described, *infra*, in detail (during which the plaintiff was denied a hearing as well as the right to see and rebut the several adverse reports submitted by his superiors), active duty orders were issued.

The complaint raised several substantial issues:

> Count I — the decisions of the defendants (not to grant excused absences or equivalent training) were erroneous, arbitrary and beyond the permissible bonds of discretion available to them
>
> Count II — the procedures followed by the defendants were illegal in numerous respects; said illegality resulting from
>
> a. the defendants' failure to follow some of their own regulations;[2]

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2. The version of AR 135-91 in effect when the plaintiff commenced his appeal provided that the hearing procedures of AR 15-6 were applicable, and the defendants admittedly did not follow AR 15-6. Nor did the defendants follow that portion of AR

b. the illegality of other regulations which were followed;[3] and
c. the absence of any regulation to cover certain aspects of the appeal procedure.[4]

Count III — the availability to the defendants of other procedures for dealing with the alleged misconduct of the plaintiff, which procedures (under the Uniform Code of Military Justice) embody minimal guarantees of due process, renders unconstitutional the defendants reliance on the up-to-two-year involuntary activation procedure, under which there is a total lack of due process.

On December 3, 1971, the matter was argued on the defendants' Motion for Summary Judgment. On April 7, 1972, District Judge Higginbotham issued an order directing that the matter be reargued on May 19, 1972, as to certain specific issues (A42-A43). These issues concerned the purported November, 1970 amendment to AR 135-91, ¶20(e) which eliminated the application of AR 15-6 to the appeal procedure (see fn. 3, below), as well as the rights that would be available to the Army if the matter were remanded to it for reprocessing. On June 27, 1972, Judge Higginbotham filed an opinion and order granting the defendants' Motion for Summary Judgment (A44-A53). On appeal, the Court of Appeals for the Third Circuit affirmed without opinion (A55-A56).

Note 2—*Continued*

135-91, ¶20(e) which requires "a board of officers to determine findings and submit recommendations."

3. The defendants have contended that the applicability of AR 15-6 to AR 135-91 appeals was terminated in November, 1970 (prior to the plaintiff's appeal). It is plaintiff's position that this purported amendment of AR 135-91 was illegal in that it was at variance with AR 310-3, which governs the amendment of other Army regulations.

4. The regulations are silent with respect to the right of a reservist to see and respond to the adverse reports which are placed in his file and which form the basis of a decision to deny his appeal.

REASONS FOR GRANTING THE WRIT

I. The decisions of the defendants (not to grant excused absences or equivalent training) were erroneous, arbitrary and beyond the permissible bounds of discretion available to them.

The federal courts, in recent years, have had numerous occasions to review military decisions involving individual reservists[5] in two distinct areas—the denial of an application for discharge (usually based on the reservist's claim that he had become a conscientious objector)[6] and the denial of a request for relief from an involuntary activation order.[7] Both types of decision are basically subject to discretionary standards; neither can be dealt with on the basis of precise criteria.

In the conscientious objector discharge cases, the courts have had no qualms about imposing severe limitations on the military's exercise of its discretion. In fact, many of these cases create the impression that the federal courts are empowered to undertake a *de novo* review of the reservist's application for discharge.[8] By contrast, in the

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5. It must be emphasized that this case does not involve the activation, for *military reasons*, of an entire unit. Cf. *Morse v. Boswell*, 393 U.S. 802, 89 S.Ct. 41 and 709 (1968) (Douglas, J., dissenting).

6. For an expanded discussion of the scope of judicial review in conscientious objector discharge cases, see *United States ex rel. Checkman v. Laird*, 469 F.2d 773 (2d Cir. 1972). In 1972, there were 42 reported cases involving CO discharges, 12 by reservists and 30 by men on active duty.

7. Most of the involuntary activation cases are collected in footnote 1 of *Mellinger v. Laird*, 339 F.Supp. 434, 437 (E.D.Pa. 1972).

8. See, e.g., *United States ex rel. Iberg v. Laird*, 5 SSLR 3291 (N.D.Ill. 1971) (court reviews and rejects numerous reasons stated by the appeal board in support of its denial of the discharge, including its finding that the applicant was not sincere); *Silvey v. Resor*, 5 SSLR 3357 (N.D.Ohio 1971) ("the record has been searched for any facts to support the Review Board's conclusion"

area of involuntary activation, the federal courts seem to have turned their backs completely on the reasonableness, or even correctness, of the military decisions,[9] and have concerned themselves only slightly with the legality of the procedures followed by the military.[10]

The line of cases discussed above, involving the refusal to review decisions to activate reservists, rests entirely on this Court's opinion in *Orloff v. Willoughby*, 345 U.S. 83, 73 S.Ct. 534 (1953). It is submitted that the courts below have seriously misconstrued *Orloff*.

Orloff involved an attempt by an Army doctor to have the federal courts tell the military what his duty assignment should be. Clearly, *Orloff* correctly held that the courts had no business interfering, at all, with such an internal matter. In so doing, this Court did not in any way suggest that its holding should be read as broadly as was done by the courts below. In fact, in discussing the role of the judiciary *vis-à-vis* the military, the *Orloff* Court stated:

> "While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service." 345 U.S. at 94.

Note 8—*Continued*
denying the discharge); *Hamilton v. Flanagan*, 5 SSLR 3453 (D. Kan. 1972); *Coonan v. Commanding Officer*, 5 SSLR 3603 (E.D.Wis. 1972).

9. "It is a well established principle that the federal courts will not review the discretionary decisions of the military authorities made within their valid jurisdiction." *O'Mara v. Zebrowski*, 447 F.2d 1085, 1087 (3d Cir. 1971); *Keister v. Resor*, 462 F.2d 471, 474 (3d Cir. 1972). See fn. 2 of the opinion of the district court, at page A47.

10. While the Third Circuit, in *O'Mara*, stated that it had the power "to review procedures employed by the military to determine if they comport with the requirements of procedural due process. . . ." (p.1088), it went on to state that "[t]he procedure of AR 135-91 unquestionably could be improved. . . . It is not our function to decide what is best for enlisted reservists." (p.1090)

In the context of the present case, the issue—whether the plaintiff is subject to activation—is much more akin to the issue of whether one has been lawfully inducted than to what his correct duty assignment should be.[11] In the conscientious objector discharge cases, the military makes a decision which affects whether a man will fulfill his obligation in the military (on active duty or in the reserves) or by performing alternative service as a civilian. If the decision is adverse to the applicant, he can turn to the federal courts for meaningful review (see fn. 8, *supra*). In the reservist activation cases, the military makes a decision which affects whether a man will fulfill his obligation to the military in the reserves or on active duty. Especially because there are so few safeguards surrounding the procedure which leads to activation, it seems unconscionable for the federal courts to deny any review. Clearly, such a result is not required by *Orloff* and would seem to run counter to this Court's decisions in *Burns v. Wilson*, 346 U.S. 137, 73 S.Ct. 1045 (1953) (scope of federal judicial review of military decisions depends on the extent to which the military "has dealt fully and fairly with" the issue); and *Harmon v. Brucker*, 355 U.S. 579, 78 S.Ct. 433 (1958) (federal court has the power to review the character of a military discharge). The involuntary activation procedure is an anomaly, even under the military's system of justice. Now that the pressures of the Indochina war have eased substantially, it would seem to be an appropriate time to deal with the "short shrift" treatment which this very serious group of cases has received by the lower federal courts.

In any event, even under the existing state of the law, there must be a point at which a court can say that the military has abused its discretion. See *Bluth v. Laird*, 435 F.2d 1065, 1071 (4th Cir. 1970) (military decisions can be overturned if "a clear and unequivocal abuse of discretion

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11. See footnote 5, *supra*.

has been demonstrated"). A review of the facts suggests that this case involves such a "clear and unequivocal abuse of discretion."

The six absences charged against the plaintiff can be dealt with in two groups—the first two and the last four. The first two (January 10, 1971) were based on the plaintiff's absence on that date from the unit training assemblies.[12] However, a medical excuse was offered, and the question here presented is whether the defendants' rejection of that medical excuse was a "clear abuse of discretion."

The pertinent facts in this regard are as follows. During the period in question, the plaintiff's unit was subject to a specific administrative directive entitled, "Reporting Absence Due to Illness." The plaintiff followed the provisions of this directive, in that he attempted to report his condition to the unit. However, his one opportunity to call went unanswered (Complaint ¶10).[13] Plaintiff related the foregoing events to his unit's executive officer (second in command), Major Mahan, on the next date for which a training assembly was scheduled (February 13, 1971). On that date, Major Mahan stated to the plaintiff that "he, Mahan, believed that the plaintiff was in

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12. The other four absences were accrued during the weekend of February 13 and 14, 1971, and were based on the fact that the plaintiff was not in uniform when he attended those drills. The explanation offered by the plaintiff was that he was told the February drills were to be held on the 20th and 21st, and that on the 13th and 14th, his uniforms were at the cleaners. While the plaintiff feels that under these circumstances, the awarding of *four* unexcused absences was unjust and a clear abuse of discretion, the abuse is not as clear as that which was committed with respect to the January 10, 1971 absences.

13. The plaintiff lived in an apartment by himself, and had no telephone. His only access to a phone on that date was in the luncheonette below his apartment, which is not normally open on Sunday. Plaintiff was only able to make one call, when the owner came in briefly, to do some cleaning (Complaint, ¶10).

fact sick and unable to attend the unit's training sessions on January 10, 1971."[14]

Under these circumstances, it is completely unjustifiable for Mahan (apparently the effective decision-maker in the unit) to charge the plaintiff with unexcused absences. Especially in view of the lack of any hearing or meaningful appeal procedures, it is imperative that the federal courts undertake at least a minimal review of the basic decisions which led to the activation.

II. The activation of the plaintiff resulted from numerous procedural defects and irregularities.

For some reason, the district court stated in its opinion:

> "Private Moxey does not make the claim, clearly within the jurisdiction of a court, that the Army violated its own regulations. His claim is that the regulations themselves are invalid." (A48, fn. 3)

Such an assertion is incredible and is completely contradicted by the complaint and the briefs filed in the district court. All of the issues raised on appeal, several of which involve the claim that the Army violated its own regulations, were made in the district court.

A. *The appeal procedure employed by the defendants was constitutionally deficient by reason of a failure to permit the plaintiff to respond to three separate documents, adverse to him, which were placed in his file.*

As noted earlier, the procedures made available to the plaintiff, as he sought to contest the involuntary activation, did not include any type of hearing. This lack of a hearing is challenged later on in the brief as being in violation both

14. Request for admission No. 1. The defendants' answer to this request, that they "are without sufficient information to respond", is clearly insufficient under Rule 36(a), F.R.Civ.P.

of Army regulations as well as minimum due process requirements. In a different "factual context", the Third Circuit found that the absence of any hearing was not unconstitutional. *O'Mara v. Zebrowski*, 447 F.2d at 1089. In so ruling, the court noted the availability of "an appeal in which the reservist has an opportunity to 'explain those facts pertinent to his case *which he feels were not fully considered*, and *** include any additional appropriate evidence ***' Army Reg. 135-91(20)(a)." (emphasis added)

All of the pertinent documents from the appeal file are reproduced in the Appendix. They include several letters written by the plaintiff (A8-A28) as well as three documents prepared by the defendants: a purported factual summary, signed by Major Mahan and two sergeants, dated February 14, 1971 (A1-A2); a five page response by Captain Seely dated June 10, 1971, to the plaintiff's several appeal letters (A29-A33); and a three page recommendation on behalf of the Commander of the First United States Army, dated August 11, 1971 (A36-A38). None of these three documents was seen by the plaintiff until after the final action by the Army (see A35), yet the documents contain many factual assertions which are not true, assumptions which are not true, and arguments which the plaintiff did not know were being used and which his appeal letters do not anticipate.

For example, the February 14th summary, while containing a substantially accurate factual recital of some of the events of that weekend, ends with an inaccurate value judgment:

> "The attitude of PVT Moxey and appearance of uniform, in the opinion of the undersigned, is a definite factor in morale and discipline, and affects other members of this unit."

The June 10, 1971 memorandum by Cpt. Seely contains a point by point rebuttal of the plaintiff's arguments. With regard to the January 10, 1971 absence, Cpt. Seely states "that a doctor's excuse is required for illness . . . ." (A29, ¶2.b). The Captain totally ignores the impact of the

unit's administrative directive, which eliminates the need for doctor's excuses (see request for admission 4). In ¶2.c, dealing with the plaintiff's error as to the February drill dates, Cpt. Seely asserts that "it is contrary to human experience for a person not to read a letter that arrives by way of 'registered mail.'" This is an observation which the plaintiff should have been permitted to rebut, since the registered letter in question deals basically with unexcused absences, and the notification of the next meeting date appears at the end of the letter. Furthermore, ¶2.c challenges the plaintiff's contention that he was misadvised, by telephone, of the meeting date, since he failed "to identify the person at the reserve center who allegedly mislaid [sic] him. . . ." (A30). Cpt. Seely claimed "that the AST's always identify themselves when answering the phone, are very competent, and know when assemblies are scheduled." (Id.) Had the plaintiff been given an opportunity to respond, he would have noted that the AST's, when identifying themselves, speak at a blinding and unintelligible speed, and that while they may be competent, three different units drill at Norristown and even competent AST's can make mistakes. The final portions of ¶2.d (A31) deal with a hitchhiking incident which occurred after the activation procedures were initiated and which is irrelevant, and a categorically untrue, slanderous charge that the plaintiff "has been known to use the name of Mayor Caiola carelessly and without authorization."

The August 11, 1971 report from the First Army offers three points in support of its negative recommendation. Paragraph 3.a (A36) deals with the January 10th medical excuse, and as in the case of Cpt. Seely's report, totally ignores the effect of the unit's administrative directive. Paragraph 3.b reiterates the points, discussed above, in connection with ¶2.c of Cpt. Seely's letter. Paragraph 3.c deals with the plaintiff's claim that his activation constitutes unequal or discriminatory treatment. While we do not press the charge of discrimination as a separate issue, it is interesting that the First Army states, "The claim that a

Specialist Yadavia regularly wore civilian clothing to meetings also contains the explanation that the enlisted man had not been issued a duty uniform." (A37). It is significant that the record contains nothing to substantiate this assertion, and it is believed by the plaintiff to be untrue.

The foregoing discussion should demonstrate, rather clearly, that the plaintiff *in this case* was substantially prejudiced as a result of his inability to see and respond to the adverse recommendations. Since the appeal regulation gives the plaintiff the right to "explain those facts pertinent to his case which he feels were not fully considered," it seems implicit that the reservist must be given copies of the adverse reports in order to know what was and what was not "considered." In the present case, the plaintiff made a specific request to see and respond to the adverse recommendations (A34). The defendants' response, dated August 11, 1971 stated that,

> "It has been determined that it would not be appropriate to provide you with the requested materials at this time. Please be advised, however, that in the event your appeal is disapproved at the Department of the Army level, you will be supplied with a copy of all documents considered by the appeal board." (A35).

The denial of this specific request would seem to be prejudicial procedural error under decisions of this Court such as *Gonzales v. United States*, 348 U.S. 407 (1955); *Greene v. McElroy*, 360 U.S. 474 (1959); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

Gonzales involved the denial of an intermediate recommendation of the Department of Justice made to the Selective Service Appeal Board. In *Crotty v. Kelly*, 443 F.2d 214 (1st Cir. 1971), the *Gonzales* principle was applied to the intermediate recommendation made to the Army Conscientious Objector Appeal Board. There, an Army National Guardsman sought relief from involuntary activation. His application for discharge as a conscientious

objector had been denied, and apparently, the involuntary activation was based upon absences which were admittedly unexcused. The First Circuit rejected the appellant's theory that the procedure followed in his AR 135-91 appeal was prejudicial because he

> "did have access to most of the National Guard files and did know the reasons for his call-up, yet he made no effort to respond to these reasons. *Had he made an effort to refute the charges against him*, he might have been prejudiced if the investigative report was not available to him, but not having taken that initial effort, petitioner has no grounds to complain." 443 F.2d at 215. (emphasis added)

In the present case, plaintiff did make effort to learn of the adverse recommendations, he was prepared to respond, and he did not know the reasons why he was given unexcused absences for the drills (as opposed to excuses or equivalent training assignments). See also *Ryan v. Barkley*, 342 F.Supp. 362 (E.D. Pa. 1972) (on point).

B. *At the time plaintiff appealed the activation order, the applicable regulation (AR 135-91, ¶20) provided that the hearing procedures of AR 15-6 was applicable.*

Change No. 6 of AR 135-91, effective as of *March 30, 1970*, amended the activation procedure by requiring the review board, in disposing of appeals, to "follow procedures as set forth in AR 15-6." (See A59, A58). AR 15-6 provides for numerous procedural safeguards (see A49).

The drill dates for which the plaintiff has been charged with unexcused absences are January 10, February 13 and February 14, 1971. The plaintiff was notified on February 23, 1971, that procedures had been initiated to have him activated. Although the several letters of appeal submitted by the plaintiff are undated, it appears that the typed appeal letters were submitted in early March, 1971

and resubmitted during the middle of that month (See A18). On April 2, 1971, formal notification of the activation was mailed from headquarters of the First Army (A6-A7). This notice stated that the plaintiff had fifteen days to file an appeal. Presumably, the handwritten appeal letters were written in response to this notice. In any event, it is clear that the plaintiff had done all he could with respect to the appeal prior to *June 1, 1971*.[15]

On June 1, 1971, Change No. 9 of AR 135-91 went into effect (A60). This change, which was published on April 8, 1971, eliminated the applicability of AR 15-6 from the appeal procedure (A58, bottom right).

The defendants contended, and the court below ruled, that the elimination of AR 15-6 had previously been accomplished by an electronic "message change" dated November 13, 1970 (A61-A62) and reproduced by the First Army on November 24, 1970 (A63).

In *O'Mara v. Zebrowski, supra,* the reservist was ordered to active duty on March 5, 1970, twenty-five days prior to the addition to AR 135-91 ¶20 of the right to an AR 15-6 hearing. Furthermore, at no time during the *O'Mara* litigation was the March 30, 1970 change before the courts. Thus, the Third Circuit expressly declined to rule on the applicability of AR 15-6. 447 F.2d at 1087 fn. 5. It did, however, uphold the action of the army and the procedures followed "*in light of the factual context of* [*the*] *case*." Id. at 1089. Nevertheless, the Court did observe:

> "The procedure of Army Reg. 135-91 unquestionably could be improved." Id. at 1090.

In fact, the procedure had been improved on March 30, 1970, by the addition of ¶20(e), which provided that the appeal board procedures would be governed by AR 15-6,

15. The Appeal Board did not act on the plaintiff's case until September, 1971, at which time, it denied relief (A39-A41). Admittedly, none of the provisions of AR 15-6 were followed by the Appeal Board.

and that the "format of the [appeal] board proceedings will be prescribed by the Commanding Officer, United States Army Reserve Components Personnel Center."

It appears, from the opinion in *Higbee v. Laird*, 4 SSLR 3555 (D. N.J. 1971), that the "format prescribed by the Commanding Officer" was simply that there would be no hearing. The existence of such a "non-format" is also suggested by Circular No. 135-7, the Bulletin issued by First Army Headquarters on November 24, 1970 (A63). This Bulletin is actually a reprint of a message from the Office of Personnel Operations, Reserve Components Personnel Center (OPO, RCPC), issued on November 13, 1970 (A61-A62). Paragraph 1 indicated that there already had existed a "policy of not authorizing personal appearances . . . ." This is the policy, or "format", which the court in *Higbee* felt was of "dubious" legality, and which plaintiff contends is clearly illegal.

Paragraph 2 of the "OPO, RCPC message" begins:

> "In order to clarify the policy, paragraph 20e, AR 135-91 *will be amended by printed change* to read as follows:" (emphasis added)

There then follows the language which did appear in printed Change No. 9, dated April 8, 1971, with an effective date of June 1, 1971 (see A60).

If the "OPO, RCPC message" ended with paragraph 2, there could be no question that it was inapplicable to the present case. However, paragraph 3 of the "message" states, "The above provisions are effective immediately."

In view of the introduction to paragraph 2, which indicates that the "message" contains a *proposed amendment*, it would seem that paragraph 3 means only that the *proposal* is effective immediately. However, even if it was the intention of the proponent of the message—the Office of Personnel Operations, Reserve Components Personnel Center (OPO, RCPC)—that the change take immediate effect, plaintiff submits that the OPO, RCPC is without

authority to amend a regulation such as AR 135-91 which was issued by order of the Secretary of the Army.

Under the Constitution, power to make (and by implication, to amend) rules for the Army is vested in the President and Congress. At 5 U.S.C. §301, Congress delegated its power, as follows:

> "The *head* of the Executive department or military department may prescribe regulations for the government of his department . . . ." (emphasis added)

In the case of the Army, this means the Secretary of the Army; not the Office of Personnel Operations. The record here is devoid of any purported sub-delegation of rule-making power by the Secretary to the OPO, but even if such a sub-delegation were shown, it would be argued that Congress did not authorize the Secretary to so sub-delegate.

It seems clear, then, that the November 13, 1970 "message" quoted in the November 24, 1970 Bulletin, has no effect on the plaintiff's case; an additional reason further reinforces this contention.

AR 310-3 is a regulation that governs the amendment of other Army Regulations. Paragraph 1-12 sets forth the criteria governing "Interim changes to DA (Department of Army) publications." Interim, or "message" changes may only be used "in rare instances" and "under the most urgent circumstances."

The failure to adhere to the requirements of ¶1-12 led to the invalidation of a purported "message change" in *Wright v. Laird*, 4 SSLR 3656 (N.D.Cal. 1970). At issue was the effect of a message change in the regulation dealing with conscientious objector discharges. The original regulation provided that if such applications were submitted at replacement stations, they would be processed at such stations. By "message change", the Army provided that applications filed at replacement stations would not be considered but would be forwarded, with the soldier, to his next permanent duty station (normally, Viet Nam). Judge Wallenberg held that the "message change" was not

authorized by AR 310-3, ¶1-12, and accordingly, he directed the Army to process the plaintiff's application in accordance with the original regulation.

In the event that the message change under consideration in this case was issued by the Department of the Army (as opposed to the Office of Personnel Operations), it would seem, under the authority of *Wright*, that it is invalid and cannot be applied to the plaintiff.

An additional argument supporting the plaintiff's contention that the message change was not *intended* as a change in the regulation is the fact that the transmittal sheet for Change No. 9 does not show that any message change has been superseded (A60). Compare the transmittal sheet for Change No. 6 (A59), where a message change not relevant to this case *was superseded*. Finally, the November 13, 1970 message (A61-A62) does not purport to be an "interim change"—compare the examples set forth in AR 310-3, fig. 1-1.

The district court completely ignored the question as to what was intended by the November 13, 1970 message and it dodged the question whether, assuming an "interim change" was intended, the Army did or did not follow AR 310-3, ¶1-12:

> "It is clear that the Army's use of the 'message change' procedure indicates a determination by the Army that the instant change (removing the applicability of AR 15-6 to the AR 135-91 call-up procedures) was considered to be 'urgent'. Thus, a federal court cannot 'second guess' such a discretionary determination by the Army as to what is or is not 'urgent'." (A51-A52).

Such an extension of the "no judicial review of discretionary determinations" rule is incredible. The issue is a legal one—whether the purported change in one regulation violated another. To take this issue out of the scope of judicial review is to flatly ignore the well-settled rule that courts

can determine whether the Army has followed its own regulations.[16]

It is clear that this issue was not dealt with in *Keister v. Resor*, 462 F.2d 471, aff'g, 343 F. Supp. 203 (E.D.Pa. 1971). There, the plaintiff did not question the effect of the November 13, 1970 message (343 F.Supp. at 208) and instead, proceeded with the basic "contention . . . that he is entitled by AR 15-6 to a hearing before his unit commander." (462 F.2d at 474). In the present case, Moxey's contention is that he is entitled by AR 135-91, ¶20(e) to an AR 15-6 hearing before the appeal board.

C. *The appeal procedure followed by the defendants was defective in two respects: the appeal board failed to give the plaintiff's case meaningful consideration, and then it forwarded meaningless, "canned" findings to the Commanding Officer, whose ultimate decision thus became tainted.*

Paragraph 17 of the complaint asserts, "on information and belief, the appeal board . . . did not in fact give the plaintiff's case meaningful consideration." Plaintiff sought to elicit some of the facts that would relate to this claim, in interrogatories 5, 6 & 7. The defendants refused to answer questions 5(c), 6 & 7, and stated that the appeal file answered questions 5(a), (b), (d) & (e). Plaintiff's motion to compel answers to these interrogatories, filed on November 19, 1971, was never acted upon by the court below. Plaintiff made a further attempt to expand the record in this regard in request for admission No. 5. The defendants' answer resolved the fact that the ultimate action on the appeal is made by the Commanding Officer of the United States Army Reserve Center (¶5.a) but left as disputed questions of fact, whether the Commanding Officer

16. At the very least, this issue raises a factual question that is within the scope of federal jurisdiction and which could not have been properly disposed of on a motion for summary judgment.

reviews the entire file or just the findings and recommendations of the appeal board (¶5.b) and whether the appeal board findings are based on each individual case or are "canned" findings used in most, if not all cases (¶5.c).[17]

Since the district court below acted on the defendants' motion for summary judgment, all factual disputes must be (for purposes of the motion) resolved in the plaintiff's favor. As such, the present record establishes two clear infirmities in the appeal process.

First, under the applicable regulation [AR 135-91, ¶20(e)], the ultimate decision is made by the Commanding Officer, on the basis of "findings and . . . recommendations" submitted to him by the appeal board. Since the findings submitted by the appeal board in this case are "canned" and thus meaningless, it is clear that a decision based on these "findings" would violate the plaintiff's right to a fair and meaningful appeal.

Secondly, the present record establishes the fact that the appeal board did not, itself, give meaningful consideration to the plaintiff's case, again an infringement of his right to appeal.

In sustaining what was acknowledged to be a somewhat unfair procedure, the Third Circuit in *O'Mara* placed great emphasis on the right to appeal. The present record raises very serious questions as to whether that right of appeal had any meaning. Research has disclosed no reservist activation case dealing with these issues. However, analogous issues have been dealt with in several Selective Service and conscientious objector discharge cases. These

17. In connection with the "canned" findings issue, there has been attached to the Appendix the appeal board "findings" from five other reservist activation appeals, as follows: *Keister*, A64; *Caruso*, A66; *O'Mara*, A68; *Mellinger*, A69, and *Drennen*, A70. The findings in each case (paragraph 5) are identical, word for word, with the findings made in the present case (A40). Neither petitioner nor his counsel is aware of a single case decided by the AR 135-19 appeal board which did not have the same, identical findings.

cases, set forth in the margin,[18] involve appeal boards condemned for (a) failing to give meaningful consideration, (b) relying on an improper or invalid summary of the file, and/or (c) use of "canned" findings.

III. The availability to the defendants of other procedures for dealing with the alleged misconduct of the plaintiff, which procedures embody minimal guarantees of due process, renders unconstitutional the defendants' reliance on the involuntary activation procedure, under which there is a total lack of due process.

The plaintiff faces a punishment of sixteen months of active duty, because he did not appear on one day, and was not in a proper uniform on two other days. Under the Uniform Code of Military Justice, the plaintiff could have been charged under Article 86 (10 U.S.C. §886) with *Absence without leave;* Article 92 (10 U.S.C. §892) with *Failure to obey order or regulation;* or, perhaps, under Article 134 (10 U.S.C. §934), the *General Article*, for "disorders and neglects to the prejudice of good order and discipline in the armed forces . . . ." The maximum penalties that the plaintiff would have been subjected to, under the

18. The leading selective service case in this area is *United States v. Wallen*, 315 F.Supp. 459 (D.Minn. 1970). Other selective service cases include *Slettehaugh v. Tarr*, 322 F.Supp. 180 (D. Minn. 1971); *United States ex rel. Scott v. LaFrance*, 4 SSLR 3493 (N.D.Ohio 1971); *United States v. Weaver*, 336 F.Supp. 558 (E.D. Pa. 1972).

In *United States ex rel. Armstrong v. Wheeler*, 321 F.Supp. 471 (E.D.Pa. 1970), the present Chief Judge reversed the Army's denial of an application for CO discharge. At page 479 fn. 13, Judge Lord noted the CO Appeal Board's use of "a stock paragraph" and condemned it. See also, Judge Lumbard's dissenting opinion in the CO discharge case of *Rosengart v. Laird*, 449 F.2d 523, 537 (2d Cir. 1971) ("It is fundamentally unfair to set forth internally contradictory standard phrases in place of sensible reasons for a decision"), majority opinion vacated, 405 U.S. 908, 92 S.Ct. 931 (1972).

UCMJ, are confinement for 1, 3 and 1 months, respectively, and forfeiture of two-thirds pay for the same periods. Under the UCMJ, the plaintiff would have had the benefit of basic procedural safeguards, even under the "non-judicial punishment" provisions of Article 15 (U.S.C. §815). See, e.g., *Burns v. Wilson*, 346 U.S. 137, 73 S.Ct. 1045 (1953).

A second route available to the defendants for dealing with the alleged unsatisfactory performance of the plaintiff would be under the provisions of 10 U.S.C. §270(b). This section, which was first enacted in 1958 and amended as recently as 1971, provides that a reservist who does not perform satisfactorily "may be ordered without his consent to perform additional active duty for training for not more then 45 days."

Under these circumstances, the constitutionality of the use of the vastly disproportionate 16 month activation punishment is a serious question. It was raised in the courts below, but ignored.

In *O'Mara v. Zebrowski*, the Third Circuit specifically declined to rule on the claim that the up-to-two-year activation procedure constituted cruel and unusual punishment. 447 F.2d at 1091 n.25. However, the opinion noted that,

> "Although O'Mara seeks to characterize involuntary activation as 'punishment,' and thereby magnify its impact upon him, this characterization does not fit well, for involuntary activation befalls reservists who fail or are unable to attend unit training assemblies because of a change in residence or job interference, as well as those who fail to attend without proper authority.

A footnote at this point continued the thought as follows:

> "13. Army Reg. 135-91(5) (b). It is difficult to believe that the Army has a consistent policy of 'punishing' reservists who are unable to attend unit training assemblies because they move outside the area in which their unit is located." 447 F.2d at 1089.

The record in *O'Mara* was completely devoid of any indication as to how the involuntary activation provisions were applied. The present record, likewise, contains no factual basis to support this theory. It is petitioner's belief, as well as that of his attorney, that the activation procedures are never used against a reservist who moves or changes jobs, until a substantial period of time has elapsed (during which, the reservist is given priority in joining a new unit).

This completely unfounded rationale for concluding that involuntary activation is not punishment was seized upon by the District Judge in *Keister v. Resor* as the basis for rejecting the "cruel and unusual punishment" argument. 343 F.Supp. 203, 211-12 (E.D.Pa. 1971). As in this case and in *O'Mara*, there was nothing in the record in *Keister* concerning the application of the involuntary activation provision to reservists who move or change jobs. In affirming *Keister*, the Third Circuit did not discuss the cruel and unusual punishment issue, though the opinion ended with, "The order of the district court will be affirmed in all respects." 462 F.2d 471, 475 (3d Cir. 1972).

A reservist is primarily a civilian. His expected commitment to the military, after initial training, is one weekend per month and two weeks in the summer. Admittedly, a reservist knows that in time of emergency, extended service on active duty may be required. In such event, the disruption of one's career or education and of one's family life, as well as the risks to life and limb which attend active duty in the military, are sacrifices which the reservist will make. In the absence of the countervailing need created by a national emergency, involuntary activation amounts to punishment. For a reservist, it is as severe, if not more so, than incarceration. The court martial and 45-day activation procedures represent reasonable methods for dealing with an allegedly unsatisfactory reservist. Especially since such *reasonable* procedures do exist, it is clear that the up-to-two-year activation is wholly disproportionate to the offenses and shocking to the conscience. Cf. *Bell v. United*

States, 349 U.S. 81, 75 S.Ct. 620 (1955); *Hemans v. United States*, 163 F.2d 228, 237 (6th Cir.), *cert. denied*, 332 U.S. 801 (1947).

CONCLUSION

The appellant in this case is a member of the United States Army Reserves. His commitment to the military consisted basically of six months on active duty, followed by five and one-half years as an active reservist (training sessions one weekend per month plus two weeks in the summer). During the final year of this six-year obligation, he was ordered to perform sixteen months of involuntary active duty based upon unexcused absences for three dates (two meetings per day, i.e. six meetings). On two of the days (one weekend), appellant was present but not in uniform due to the fact that both of his uniforms were at the cleaners; on the third day, he was absent and although his absence was acknowledged by the defendants to have been caused by an actual illness, he was nevertheless charged with an unexcused absence.

In seeking relief from the involuntary active duty orders, plaintiff raised various issues, including three specific challenges to the propriety of the administrative appeal procedure followed by the defendants. In the court below, only one of these issues was dealt with, the other two were ignored.[19]

---

19. The district court rejected appellant's contention that the version of AR 135-91 in effect with the administrative appeal was taken provided for an appeal hearing pursuant to AR 15-6 (67a-69a). This is issue II-B, discussed at pages 15-20 of this petition.

The lower court ignored appellant's contentions that he had a right to see and respond to adverse reports in his file before the Appeal Board acted (issue II-A, pp. 11-15 of this petition), and that the appeal itself was defective due to inadequate consideration by the Appeal Board as well as its use of "canned" findings (issue II-C, pp. 20-22 of this petition).

The Court of Appeals did not deal with any of the issues.

In *O'Mara v. Zebrowski*, 447 F.2d 1085, 1088 (1971), the Third Circuit stated:

> "We believe that a federal court has jurisdiction to review procedures employed by the military to determine if they comport with the requirements of procedural due process in light of the context in which the procedures operate."

The basic procedural claim asserted in that case was the right at some point in the appeal process to a *full hearing*. In rejecting that contention, the court seemed to rely on the existence of a *written appeal* to sustain the constitutionality of the overall procedure. At page 1090, Judge Van Dusen stated:

> "[3] The procedure of Army Reg. 135-91 unquestionably could be improved. Determinations of a rather summary character which substantially affect individuals are, however, an everyday occurrence in the military. It is not our function to decide what is best for enlisted reservists. The challenged procedure does permit a reservist to take the matter up with his unit commander, and it also *permits an appeal in which the reservist has an opportunity to 'explain those facts pertinent to his case which he feels were not fully considered, and * * * include any additional appropriate evidence.* * * *'* Army Reg. 135-91(20) (a). Given the factual context in which this procedure operates, and the presumption of constitutionality that attaches to this statutorily authorized procedure, we are unable to conclude that the procedure is constitutionally defective."
> (emphasis added, footnotes omitted)

In the present case, the two procedural issues which were ignored by the district judge raise very serious questions as to whether the "procedures employed by the military" "comport with the requirements of procedural due process in light of the context in which the procedures operate."

The appellant, in this case, is faced with the threat of a most severe disruption to his life. That disruption is based upon a determination by the military that his participation as a reservist was unsatisfactory. The facts, in this case, raise serious questions as to whether that determination, made initially by the unit commander, was just and proper.

The Army purports to make available administrative procedures for testing the propriety of the unit commander's decision to activate the reservist. The record, in this case, clearly demonstrates the deficiencies and shortcomings of these procedures. When the appellant sought a small dose of fair treatment from the Army (the right to respond to adverse comments prior to a decision by the Appeal Board), his plea fell on deaf ears.

Realizing that "determinations of a rather summary character are an everyday occurrence in the military," the appellant turned to the federal courts, which claimed to have the power (if not the duty) to "review procedures employed by the military to determine if they comport with the requirements of procedural due process. . . ." In the district court, appellant was not afforded a trial, and the opinion granting summary judgment to the government ignored two of the most important issues raised. The Third Circuit Court of Appeals affirmed without opinion.

If these issues are without merit, let someone say why, for not even the government's briefs in the courts below did that. If they have merit, then the judgment below must be reversed. At this point, however, there is clearly a need to grant this petition, not only to permit a fair and just disposition of this case, but also to rectify the drift

which has occurred in the lower federal courts in this type of case, away from the principles this Court articulated in *Gonzales, Harmon v. Brucker* and *Burns v. Wilson.*

Respectfully submitted,

JOHN DAVID EGNAL
Attorney for the Petitioner

Of Counsel:
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1315 Walnut Street
Philadelphia, Pa. 19107

SUPREME COURT, U. S.
FEB 4 1974
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1186

TODD G. MOXEY, *Petitioner*

v.

EDGAR C. SEELY, JR.

and

SECRETARY OF DEFENSE, *Respondent*

Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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A1

HEADQUARTERS 416TH CIVIL AFFAIRS COMPANY
1020 Sandy Street
Norristown, Pennsylvania 19401

14 February 1971

SUBJECT: MOXEY, Todd G. (PVT) 203-34-2216

Commanding Officer
416th Civil Affairs Company

On 13 February 1971, 0800 hours, PVT Todd G. Moxey, 203-34-2216, a member of this unit, was not present at the regular scheduled monthly meeting, of which he was cognizant. At 1100 hours, same date a telephone call was made by Sgt. Bender (confirmed by 1SG Rodrique) to this enlisted man (telephone number 272-9850) at his address of record, 155 W. Elm Street, Norristown, Pa. 19401, to question why he was not present at the drill. On 13 February 1971, 1200 hours, PVT Moxey did report to the Reserve Center, and to 1SG Rodrique, but he was out of uniform. When questioned by 1SG Rodrique about being out of uniform, PVT Moxey stated that his uniform was in the laundry. He was given a "U" for this meeting (0600 hours to 1630 hours, 13 February 1971) and fully advised of this decision by LTC Seely, the Commanding Officer of the unit. He was again advised that he would not be given credit for the two meetings scheduled for this date because he was out of uniform. He acknowledged receipt of the letter being sent to him, by signing the postal receipt form. This occurred at 1345 hours. A copy of the letter sent to him was given to him personally by Major O'Brien. PVT Moxey was then advised by Major O'Brien to report to the Reserve Center on 14 February 1971, at 0800 hours in proper uniform. On 14 February 1971, at 0800 hours, PVT Moxey was present at the meeting, but in an unexcusable appearance. Accordingly, he was not given credit for the scheduled meetings on this date from 0800 to 1200 hours and 1250 to 1630 hours. Although PVT Moxey did at-

tend the meetings scheduled on 14 February 1971, the uniform was dirty (covered with mud), unpressed, with a large slit in the sleeve and with holes in the shirt and pants. The condition of the uniform was inexcusable. PVT Moxey was presented to LTC Seely who acknowledged the unexcusable appearance of this person. 1SG and Major Mahan were in their presence. The time was presented 0800 hours 14 February 1971. LTC Seely advised PVT Moxey that he would not receive credit for the morning meeting of this date, and if he did not return to the afternoon meeting in proper uniform, he would not receive credit for the afternoon meeting. PVT Moxey was advised by Certified Mail sent 14 February 1971 to confirm the unexcused absences heretofore stated. His records indicated that he had a total of six (6) unexcused absences as of 14 February 1971, which is over the authorized limit. LTC Seely further advised him that proper action will be taken to bring this matter to higher headquarters. The attitude of PVT Moxey and appearance of uniform, in the opinion of the undersigned, is a definite factor in morale and discipline, and affects other members of this unit.

WITNESS: CHARLES E. MAHAN, MAJ. CA-USAR

PAUL L. BENDER, SGT.

HENRY J. RODRIQUE, 1SG

A3

416TH CIVIL AFFAIRS COMPANY
1020 Sandy Street
Norristown, Pennsylvania 19401

23 February 1971

SUBJECT: Request for Active Duty Orders UP AR 135-91

Commanding Officer
304th Civil Affairs Group
Woodhaven and Comly Roads
Philadelphia, Pa. 19154

1. Request that active duty orders be issued on the individual named below under the provisions of AR 135-91.

2. I have personally verified the circumstances in this case and have determined that the administrative requirements of AR 135-91 have been adequately complied with and that the individual concerned failed to fulfill the satisfactory participation requirements of that regulation.

3. The following information is provided:

a. Full name: MOXEY, TODD GRAY
b. Grade: PVT E2
c. Service Number: 203-34-2216
d. SSAN: 203-34-2216
e. USAR Unit of assignment: 416th CA Company, Norristown, Pa. 19401USARC,1020 Sandy St., UIC: WRTP AAA.
f. DOR: 20 July 68
g. HOR: 155 West Elm St., Norristown, Pa. 19401
h. Period of AD requested: 17 Months, 12 Days.
i. Time previously served on AD, AFT, ACDUTRA: 4 Mos; 18 Days (ACDUTRA) 2 Mos; ATTour (1967-70 Incl.)

j. PMOS: 70A10:DMCS: 70A10
k. BPED: 18 Feb 1966
l. BASD: N/A
m. Authority: 10 USC 673a and paragraph 12, AR 135-91.

EDGAR C. SEELY, JR.
LTC, CA-USAR
Commanding

3 Incls:
1. 201 File (Moxey)
2. Warning Letters of Unex Abs
3. Ltr to CO, 304th CA Gp

A5

416TH CIVIL AFFAIRS COMPANY
1020 Sandy Street
Norristown, Pennsylvania, 19401

23 February 1971

SUBJECT: Unsatisfactory Participation of PVT TODD G. MOXEY, 203-34-2216

Commanding Officer
304th Civil Affairs Group
Woodhaven and Comly Road
Philadelphia, Pennsylvania, 19154

1. PV2 TODD G. MOXEY, of this unit, has been a constant problem over the last 1½ years. He frequently fails to appear in the prescribed uniform, to present a neat and soldierly appearance, or to perform his assigned duties in a satisfactory manner as determined by the Unit Commander. In addition, he has not attended a number of drills.

2. Because of his misconduct and unsatisfactory participation, he has been reduced in rank.

3. The Commanding Officer, Executive Officer, and First Sergeant have counselled him on numerous occasions about his participation and conduct, but to no avail.

4. Letters have been submitted to him concerning his absences from drills, but it appears that this have no effect on his cooperation as enumerated above.

EDGAR C. SEELY, JR.
LTC, CA-USAR
Commanding

A6

DEPARTMENT OF THE ARMY
HEADQUARTERS, FIRST UNITED STATES ARMY
FORT GEORGE G. MEADE, MARYLAND 20755

AHAAG-CA 2 April 1971

SUBJECT: Order to Active Duty

PVT TODD C. MOXEY
155 West Elm Street
Norristown, Pa. 15401

1. This headquarters had been requested to order you to active duty for 24 months, less any active duty time you have served, for unsatisfactory participation in accordance with AR 135-91.

2. Documentation presented by your unit commander is complete and this headquarters has requested assignment instructions from Department of the Army this date. Active duty orders will be issued in approximately 30 days.

3. If you wish to appeal your order to active duty you must present a written appeal with documentation to your unit commander within fifteen (15) days of receipt of this letter.

4. Delay in entry on active duty is authorized only in the specific cases outlined in paragraph 16, AR 135-91. If you wish to apply for such a delay, you must immediately present a written request with documentation to your unit commander. Requests for a delay in reporting for active duty after orders are issued will be considered only for emergencies, to include illness or injury.

5. You will be required to undergo a complete medical examination upon reporting for active duty unless you have undergone a medical examination within the past 12 months and signed a statement that to the best of your

knowledge there has been no significant change in your physical condition. If you are found to be physically disqualified, you will be discharged at the Reception Station.

FOR THE COMMANDER:

ALAN L. ATTERBURY
1LT, AGC
Asst AG

155 W. Elm St
Norristown, Pa.

Lt Alan Ackerburg
Hqs, 1st US Army
Ft George G. Meade, Md

Dear Sir:

This letter is a recounting of attempts I've made to obtain corroboration of the events as I described them and statements I made in my appeal of the action by the CO of the 4136th CA Unit to have me sent away on active duty.

I had several phone conversations with Maj. O'Brien. In the first conversation I had with him, I asked Maj O'Brien if he recalled the conversations we had on the afternoon of Feb 13th and the morning of Feb 14th. He said he did and remembered them substantially as I had recounted them in my appeal. I asked if he would put in writing the substance of these conversations – to corroborate what I had stated. He said he would and would send it to me. No letter came and about ten days after our first conversation I called again. I asked Maj. O'Brien

when the letter would be coming. He said he had prepared a rough draft and said he would have it typed up and sent to me in a couple of days. He asked again why I wanted the letter and I reiterated that I wanted it to corroborate my account of our conversation I made in my appeal. No letter has come from Maj. O'Brien.

I had several conversations with Spsc. Yadavia, the cook who has regularly worn bell bottom white dungees and a white civilian button down shirt to meetings. In the first phone conversation, I informed him that I had mentioned in my appeal that a cook in the unit wore bell-bottoms and a civilian white shirt to meetings, though I hadn't mentioned him by name. Sometime later I placed another call to Yadavia and asked if he would be willing to verify in writing that he had worn bell-bottoms and a civilian shirt to meetings (on his behalf, he had no cooks whites) and that the CO had seen him in this uniform on many occasions. He said he didn't want to volunteer this information; he was apparently fearful of some kind

trouble that might come to him. He did say though, that if someone asked if he had worn these clothes to meetings and asked if the CO had seen him he'd say yes.

I spoke with several people about occasions when the XO had granted then excused absences for meetings for business or personal reasons merely on the basis of verbal notification. Enclosed is a statement by Charles Ogelsby telling of a situation in which he was granted an excused absence on the basis of a verbal request. Ogelsby's situation differs from my request to be given an excused absence for having been sick the previous meeting in that I is a request to be excused from an upcoming meeting and mine was a request to be given an excused absence for a previous meeting but Ogelsby's request, like mine, was made orally and granted solely on the basis of this oral notification and on the basis of trust. I'm not implying that the XO should not trust the troops. I indeed, I believe he has to. But, if he acts on the basis of one way to one person, he has to act in a similar way to

another.

Unfortunately, none of the conversations I had with the XO or CO on Feb 15th or Feb 16th were [redacted] overheard by any one other than these two with the exception of the latter portion of the conversation I had with the XO on the afternoon of Feb 15th. During this portion of the conversation several people came out of a room near where the XO and I were talking, one of whom I remember was Lt Lechman. I placed a call to Lt Lechman to see if he recalled the conversation and remembered anything said. He said he remembered the conversation but could not recall anything that was said. He said when he came out of the room he heard only a few words and then saw the XO go into the CO's office.

I don't mean to sound "sour grapes" but it is difficult if not impossible to obtain statements in a proceeding such as this is if someone does not want to make a statement.

Finally, I apologize for sending this letter so late. I waited for several statements to come in that did not come in and when I had only one statement from another person to submit, I didn't see any point of submitting it. However, I decided that it would do any harm to send it along and to account the attempts I've made to get corroborative information.

Sincerely yours,
Ted Mosby

155 W. Elm St
Norristown, Pa

Lt Alan Atterbury
Hqs, 1st US Army
Ft George G. Meade, Md

Dear Sir:

S want to make a personal note. S'm 25 years old and a college graduate. Adjustment in the Army as an E-2 would not be easy to say the least S don't think there is any question that S can make a more constructive contribution in ~~civilian life~~ than S can in the military

I was married January 25, 1969. The next regularly scheduled Reserve meeting was the second weekend of the next month, February 8 & 9, 1969. I attended both days and at that meeting asked permission to be excused for the following month's meeting. I was given permission to miss the March meeting on the condition that I make it up when possible. I agreed to that condition. I asked permission to be excused from the meeting so that my wife and I could travel to Europe for two months. When I came back in April I attended one regularly scheduled meeting and one makeup meeting. Thereafter, I attended all regularly scheduled meetings.

Charles W. Bjelsby Jr.
member - 416 Civil Affairs Co.

3404th C A Group
Armed Forces Reserve Center
Woodhaven and Comly Rds
Phila, Pa.

Dear Sir:

Attached is a copy of a document with supplemental statements concerning the action by the CO of the 416th to send me to active duty. I've enclosed also a copy of the letter originally sent to you in Mar. contesting action of the CO of the 416th to have me sent to active duty (since in our phone conversation of 2 days ago, you mentioned you were unfamiliar with it - why you have received it I don't know!)

In a recent phone conversation with the reserve

reinforcement forces, personnel
division 7th Medical
Group organization that has
my file and the organiza-
tion from which correspondence
from the Army has come to
me, they indicated they
had not received the
contesting letter. I have
sent them a copy of the
original contesting letter
plus a copy of the supplemental
statement at their request.

Since, as mentioned in
our phone conversation,
I have orders to report to
active duty on May 25th
I'd appreciate as prompt
action as possible.

A copy of the supplemental
statement has been ~~mailed~~
to the CO of the 416th plus

copy of the original letter in the event it has not been brought to his attention.)

Sincerely yours,

Tom

155 W. Elm St.
Norristown, Pa.

Commanding Officer
304th CA Group
Armed Forces Reserve Center
Woodhaven and Comley Roads
Phila., Pa. 19154

Dear Sir:

Attached is a letter concerning a request by the CO of the 416th CA unit to have me sent away to active duty. It was originally submitted to you on about Mar. 2nd but was returned to me on Mar. 12th with a covering letter from the civilian aide of the 304th (signing for a Capt. Mitkus) stating that my letter had not been received until Mar. 8th and my file had been forwarded on Mar. 1st. (Why my letter wasn't forwarded I don't know) . . . Anyway, I am resubmitting the letter to you as the CO of the next higher hqs. above the 416th and as an attempt to marry this letter to my file which according to the civilian aide of the 358th CA unit has been returned to the 304th for some administrative corrections.

Sincerely yours,

Todd Moxey

155 W. Elm St.
Norristown, Pa.

Commanding Officer
304th CA Group
Armed Forces Reserve Center
Woodhaven and Comley Roads
Phila., Pa. 19154

Dear Sir:

On Feb. 23d, I received a notice from the civilian aide of the 416th CA unit in which the CO of the 416th was requesting again that I be sent away to active duty for having received 5 or more unexcused absences. I had been given "U"s for MUTA 2 drills on Jan. 10th, Feb. 13th, and Feb. 14th . . . I'd like to describe in some detail the sequence of events on and between the dates of Jan. 10th and Feb. 14th.

On Sunday, Jan. 10th, I was awakened by my alarm going off at about 7:15 AM. I had a sore throat, I felt punk, and my nose was starting to clog up. I hadn't had much sleep in the previous 4 or 5 days, and I was dead tired. In short, I didn't feel well enough to go to the meeting, and I went back to sleep. I have no phone where I live. The phone I use is in a store area downstairs from where I live. This area is closed on Sundays except on occasions when the store owner will come in to do some cleanup or repair work. If he does come, it is never until late morning or early afternoon. There was no point for me to stay up to 8:00 AM or to set my alarm for that time to try to call the unit. I awoke again that morning sometime between 10:00 AM and noon. I heard someone roaming around in the store area, so I went down and placed a call to the unit. No one answered. I let the phone ring for about 4 or 5 minutes—figuring someone had to be there. (I don't recall exactly when I phoned; it could have been around noon when everyone was eating lunch.) I went back upstairs to bed. A little while later, I went back down to try to call again, but the area was closed, and I returned upstairs.

Sometime around the 1st of Feb., I called the reserve center to find out when the next meeting was and was told it was the weekend of Feb. 20th and 21st.

On Sat., Feb. 13th about 10:30 AM, I received a phone call from Sgt. Bender inquiring why I wasn't at the reserve meeting. I said I didn't think it was until the following weekend. He said the meetings were always on the 2nd weekend of every month. I said that I knew that this was usually the case but that I'd been informed that the meeting would be the weekend of the 20th and it seemed feasible that a change had been made to allow people to take advantage of a 4 day weekend. He said no; the meeting was that weekend. I said I'd be there as soon as possible.

Thinking the meeting wasn't until the following week, I had just sent out the decent uniforms I had to the cleaners, and they were still at the cleaners. The only uniform I had was an old, dirty one with pants that had ink stains and holes and a shirt with half one sleeve ripped off. I put on civilian slacks and a sport coat and went off to the reserve center. I arrived about 11:00 AM and went upstairs to find the XO to tell him I'd been sick on the Sun. of the Jan. meeting and to explain why I was late and why I had on civilian clothes. I didn't find him. I went into the personnel section to sign in. Someone there told me that the 1st Sgt. wanted to see me. I went downstairs to look for the 1st Sgt., found him in the drill hall, and said to him that I'd been told he wanted to see me. He said he'd see me later. I went upstairs to work on the area study project I was assigned to.

About 2:00 PM, the 1st Sgt. called me from the room in which I was working. He told me that I was being given 2 "U"s for Sun., Jan. 10th, that I was being given 2 "U"s for that day and would be given 2 more "U"s for the following day if I did not have a uniform on. I told that I had been sick on Jan. 10th. He asked me why I hadn't called in. I said that I had tried to, but when I placed the call, no one answered. He said there was always someone around to answer the phone. I said that I thought this was so, but I had let the

phone ring for about 5 minutes and no one had answered. I said maybe the unit had had a formation or were at lunch. I then commented that I didn't have any decent uniforms to wear. I had thought the meeting wasn't until the following weekend. The decent uniforms I had were still at the laundry. There was nothing else really I could wear. He then said that I'd been notified that the meetings were this weekend. I said that I hadn't been so notified. Indeed, when I had called the reserve center, I was told the meeting wasn't until the next weekend. He said the letter sent me indicating that I had been given 2 "U"s for Jan. 10th had indicated that the Feb. meeting was to be on the 13th and 14th. I said it hadn't. I then asked to see the XO and CO; he said they wouldn't see me. I said again strongly that I would like to see the XO and CO. He said no; the decision was final. He then said to go ahead and leave if I wanted to.

I had no way home and it was raining, and I didn't want to stand in the rain to try to hitch a ride, so I decided to stay awhile and work on the area study. Furthermore, I wanted to try to see the XO or CO. About 15 to 20 minutes later, the 1st Sgt. came into the room where I was working with a copy of the letter sent to me indicating I was being given 2 "U"s for Jan. 10th and pointed out that it, the letter, did indeed indicate that the Feb. meetings were to be on the weekend of the 13th. I acknowledged my mistake. (When I got the letter, I knew what it was and frankly didn't bother to examine it to closely. I was never really aware that those letters included the dates of the next meeting. In the past, when I received "U"s, I was present at the reserve center. Believing that the "U"s were unjustified and being angered by being given a "U", frankly I didn't pay too much attention to the content of these formal notices when they were given to me. Moreover, since I was at the reserve center when I got a "U" and since I remained there, I got information about the dates of the next meeting the way I normally would—by getting a copy of the duty sheet distributed on Sun. afternoons. Furthermore, if anytime I missed

a weekend or a Sun. when these duty sheets were distributed, I'd call the reserve center, which I also did in this instance.)

I continued to work on the area study for awhile and then went downstairs. I ran into the XO in the hall. I said that I was being given "U"s for not having a proper uniform; I didn't think it was fair since I thought the meetings were not to be until the following weekend and my uniforms were at the cleaners. He said that the letter sent me in Jan. indicating I was being given 2 "U"s for Jan. 10th stated the Feb. meeting dates as the 13th and 14th. I acknowledged my mistake. I said though that be that as it may, I still didn't have any decent uniforms to wear. There was nothing I could do. Being given 2 "U"s for Sat. and possibly 2 more the next day seemed too harsh a penalty. He said there was nothing he could do about it. I then mentioned that I had been sick on Jan. 10th. I had tried to call the unit that day but had been unable to reach anyone. He asked me if I had a Dr.'s note. I indicated that I hadn't and said that I didn't need a Dr. to tell me I had a sore throat, a runny nose, that I was dead tired. (Moreover, it didn't seem to make much sense to go to see a Dr. unless my cold got worse; I knew myself well enough and how I react to colds to know how to take care of myself. Frankly as well, I didn't want to spend the $5 to $8 unless it were absolutely necessary.) I asked the XO if he would change the "U"s given me for Jan. 10th. He said he wouldn't. I said that if it were really essential that he have a Dr.'s written statement, I could probably get one. The XO started walking down the hall toward the stairs; I followed. He said he knew it was easy to get a Dr.'s note; all one had to do was pay $5. Climbing the stairs, he said getting a Dr.'s note wasn't necessary. I asked him again if he could change the "U"s. He said no. I then said in a hough, "In other words you don't believe me." He said no; he believed me. I said that if he believed me, why in the devil didn't he change the "U"s!! This was just incredible!

I went back to work on the area study project. Maj. O'Brien, the head of the area study project, called me over to acknowledge receipt of the formal notice that stated I was being given 2 "U"s for that day and that with these 2, I had 4 for the year. During the conversation I had with him, Maj. O'Brien inquired whether I had any uniform at all. I said that I had an old, dirty, mussed one with a shirt that had half one sleeve torn off. He suggested that I wear it instead of civilian clothes; he said civilian clothes just wouldn't do. I said I'd be glad to wear the uniform; it didn't make any difference to me; but it was a mess.

Sun., I came to the meeting in the old uniform. During the opening formation, the XO called me over and motioned for me to follow him upstairs. I did. We went into the CO's office. The XO said to the CO that he wanted him, the CO, to see me in this uniform. He, the XO, said that I was being given a "U" for the day and that I could leave. I said that I had told him the previous day that I had no decent uniforms to wear. The CO then chorted that there was nothing to say and told me to leave. I said I'd be glad to check with supply to see if they had anything I could wear. They said no, just leave. I said that giving me a "U" was just small and I left. I went down the hall to see Maj. O'Brien. I called him out of the room where he was and said that the CO and XO had just told me to leave because my uniform was a mess. I took off the field jacket I had on and showed him the shirt I was wearing. I shrugged my shoulders, and he shook his head; the uniform was as I said it was the previous day. I said I wasn't trying to flaunt anyone, but if you don't have a decent uniform, you can't wear one. He nodded and then said if the CO and XO had said for me to leave, there was nothing he could do about it. I then left the reserve center.

The "U"s for Jan. 10th are just plain and simple unwarranted. I was sick. Being given 4 "U"s for the weekend of Feb. 13th and 14th seems too harsh a penalty. Even though I was at fault in not knowing the dates of the Feb. meeting, for not reading the warning letter sent me in Jan. carefully enough to notice the dates stated in it (though I

had also been misinformed about the meeting dates when I called the reserve center), giving me a "U" for each of the 4 meetings during the weekend when there was nothing I could really do about wearing a decent uniform was like . . . beating a dead horse. Furthermore, the possible ultimate punishment (activation) is far too severe for the crime. Realistically, my not wearing a uniform did not prevent me from doing the work I was supposed to do, did not in any way seriously hamper the functioning of the unit. I don't mean to say that one should not wear uniforms to drills, but it is not all-important. Wearing a uniform is not so important that in effect one should face a possible disruption in one's life of 18 months because he is unable to wear a decent one . . . The whole situation is somewhat similar to the following: A man has 2 cars. One of his cars is being repaired; the other has a faulty muffler. He believes he won't need a car for another week and by that time the car being repaired will be ready for use. The man receives a call from a friend asking him, the man, to pay the friend an emergency visit. The man has been asked to visit the friend not only on that day but also on the following day. The man takes the car with the faulty muffler and starts out to see his friend. On the way, a policeman stops him and gives him a ticket for driving a car with a faulty muffler. The man says he received an emergency call from a friend and has to see him, and this car is his only means of transportation. What is more, he will have to pay another visit to his friend the following day. He explains to the policeman that he didn't think he would need a car for another week and by that time a car he is having repaired would have been ready. The man continues on his way to his friend's house, sees his friend and then starts to return home. On his way home, the same policeman stops him again and gives him another ticket for driving a car with a defective muffler. The next day the man starts out to visit his friend, and the same policeman stops him a third time and gives him still another ticket. On his way back home after visiting his friend, the same policeman stops him again and gives him

a fourth ticket. In addition the policeman indicates that because he, the man, has received 4 tickets, he, the policeman, is going to press charges against the man whereby he, the man, could possibly spend 18 months in jail! . . . 4 "U"s for not having a proper uniform on when there was nothing I could really do about it seems ridiculous . . . A "U" and 3 "N"s would to me seem to be a fairer penalty.

I request that the action by the CO of the 416th CA unit to have me sent away to active duty be denied. I'd also like to make a strong request or a hearing to explain other circumstances surrounding this case—if the action is not denied.

Sincerely yours,

Todd Moxey

The XO many times has authorized excused absences or alternative dates for training for members of the unit when they have personal or business matters to take care of on the dates of meetings. Only a verbal notification is needed. Frankly, I was banking on similar treatment for the meeting I missed when I was sick so I could avoid the token, unnecessary visit to a doctor and the $5 to $8 expense. Looking back, banking on this treatment was perhaps an error.

There is one cook in the unit who wears bell-bottom trousers and a white button-down-collar civilian shirt to almost every meeting. Many members of the unit wear fatigues when class "A"s are called for by the training schedule. I have worn fatigues for the last 15 months—even on occasions when class "A"s have been called for (My class "A"s were stored in a storage area several miles from where I live about 15 months ago when I moved to where I am living now; it would take about a half-day to a day of moving and digging to pull out my class "A"s.) I don't mean to use these cases as justification for not wearing a proper uniform on Feb. 13 and 14, but I cite them to point out that not having a proper uniform on is not a hard and fast reason for being given an unexcused absences. In light of the fact that these variations are tolerated, giving me 4 "U"s for not having on a proper uniform on Feb. 13 and 14 when there was nothing I could really do about it is arbitrary and discriminatory.

These occasions where I was given "U"s are not unique incidents of unfair action by the CO and XO.

There are numerous other incidents where the CO and XO have acted in an arbitrary and discriminatory manner. They are almost too many to mention; some are just ridiculous, senseless. Let me cite an example . . . I suffer from hay fever badly; at times I'm almost asthmatic; I start getting it around the middle of August and it lasts until the first frost. Our summer camp last year was during the last two weeks of August. One day we were having classes in a building that was next to a field and near some woods

that was loaded with ragweed (the weed that I'm allergic to). Before the formation after lunch, I told the troop commander, Cpt. Turner, that that classroom wasn't a very good place for me to be with my hay fever (I've found that the best way to deal with the problem is to minimize my exposure to pollen; the more exposure I have to pollen the worse I get and the more susceptible I am to getting even worse.) Cpt. Turner said alright, and noticing a couple of buttons missing from my uniform, told me to go sew on some buttons and then report to the orderly room. I went back to the barracks and started to sew on the missing buttons. While I was sewing, the 1st Sgt. came into the barracks and asked me why I hadn't reported to the orderly room after the after-lunch formation. I said that Cpt. Turnere had told me to sew some buttons on my uniform before reporting to the orderly room. The 1st Sgt. told me to report to the orderly room after I had finished. About 10 minutes later, after I had finished sewing on the buttons, I went to the orderly room. When I got there, the 1st Sgt. in a severe, stern tone of voice told me to sit in a corner of the room and mentioned that the CO wanted to see me. About an hour later, I was told to go into the CO's office. When I got into the office, the CO said to me, "Moxey, You've been f--king up." I sort of mentally said, "Hunh" and then said to the CO, "How have I been f--cking up?" He sat there for a second and then chorted, You've just been f--king up." I again asked how. He made no comment. He then said that I'd been told to report to the orderly room after the after-lunch formation. I said that Cpt. Turner had told me to sew some buttons on my uniforms and then report to the orderly room. He told me then to go out and sit in the orderly room, and he would check into the matter—as if it were of major concern to the unit. About an hour later, Cpt. Turner came into the orderly room. I mentioned that the CO had seemed concerned because I hadn't come to the orderly room right after the after-lunch formation. I said that I told him, the CO, that he, Cpt. Turner, had told me to sew some buttons on my uniform before going to the orderly room. I

said that he, the CO, had said he wanted to check on this. Cpt. Turner said he would see about it . . . Later that afternoon, I went over to the personnel section and started talking to some of the people in that section. While I was there, the 1st Sgt. came over and said I was to stay where I had been told to sit. I looked at him in some disbelief. I felt like a third grade child being told to stand in a corner. I half-laughed and said that this was childish; it was ridiculous. If I was being punished, what was I being punished for? The 1st Sgt. shrugged his shoulders sheepishly. Someone in the room said, "All you need now is a dunce cap." Later that afternoon as the duty day ended, the 1st Sgt. came up to me and said that I was being confined to barracks that night and that I had to sign in in the orderly room every hour. I couldn't believe it. I said that this was incredible. I asked what in the devil I was being punished for. He made no comment. No one told me why I was supposedly being punished . . . The whole incident was ridiculous.

(18 May 71) 1st Ind

SUBJECT: Appeal from Order to Active Duty under AR 135-91 (MOXEY, TODD G. PVT)

416TH CIVIL AFFAIRS COMPANY, USARC, 1020 Sandy Street, Norristown, Pa. 19401 10 Jun 71

THRU: Commanding Officer, Hqs, 304th CA Group, Woodhaven & Comly Rd. Phila. Pa.

TO: Commanding Officer, 358th CA Area (B), USARC, 1020 Sandy Street, Norristown, Pa. 19401

1. Reference is made to letter from PVT Moxey to the Commanding Officer, 304th CA Group, Philadelphia, Pa. pertaining to individual's appeal from reporting to Active Duty, under provisions of paragraph 20d, AR 135-91.

2. In compliance with paragraph 16b, AR 135-91, the following comments are submitted to justify the action originally initiated to order individual on Active Duty:

a. Subject individual is a graduate of Harvard University, has intelligence capability and can, when he elects to, discern right from wrong.

b. PVT Moxey knows that a doctor's excuse is required for illness, and that such an excuse is accepted only after reporting in as being ill. All other members of this unit follow this procedure. In my experience as Commanding Officer, I have found this is the only feasible way of preventing abuse and has been found necessary to avoid problems of credibility.

c. PVT Moxey's excuse about "someone at the Center" telling him that the drill was on February 20, 1971 is completely without merit. First of all, he knows the drills are

customarily on the second weekend of the month. Secondly, he acknowledges in his letter that he received a registered letter from the Unit advising him that the drill was to be on February 13 and 14, the customary weekend. Moreover, it is contrary to human experience for a person not to read a letter that arrives by way of "Registered Mail." Finally, PVT Moxey's failure to identify the person at the Reserve Center who allegedly mislaid him about the date of the drill shows the weakness of his story. The AST's always identify themselves when answering the phone, are very competent, and know when assemblies are scheduled.

d. This Unit, as PVT Moxey well knows, prescribes a uniform for unit personnel at drills. The uniform may vary to meet the requirements of training for different sections. For example, Supply and Motor Pool personnel wear fatigues, while the cooks wear whites, as prescribed by regulations. The balance of the personnel are in uniforms which are prescribed by the training schedule. The Army has given PVT Moxey two sets of fatigues and two sets of Class "A" uniforms. As to his Class "A" uniform he shows total disregard of his military obligation by his admission that he keeps them stored away so that he never has them available when they are prescribed. As to his fatigues, one pair is apparently torn and the other was allegedly out to the cleaners. Even a modicum of knowledge and intelligence would indicate that PVT Moxey had failed in his duty concerning his uniform. First, he should have taken steps to repair or replace his torn uniform. Secondly, the Army has supplied a soldier with two sets of fatigues so that a soldier would have at least one uniform available, while the other was being cleaned, or repaired. PVT Moxey was especially negligent and direlict in his duty, since he knows or should have known from the registered letter he received that the February drills were scheduled for the 13th and 14th. He had advanced notice and had plenty of time to have it cleaned, especially since the previous drill had been more than a month before. Prudence would indicate that a

soldier would have his uniform cleaned right after a drill. PVT Moxey's problems with his uniform undoubtedly results from the fact that he wears his uniform between drills as he goes about his civilian pursuits as a member of the Unit. He has been seen by CW4 Brooke McIntyre and SP5 Frank Caiola, a practicing attorney, Mayor of Norristown, Pa. (a town of 45,000), and a member of this Unit, hitchhiking in Norristown, in his uniform on a non-duty day. PVT Moxey also has been known to use the name of Mayor Caiola carelessly and without authorization, with certain incidents in which he has been involved in Norristown.

e. PVT Todd Moxey, exactly one day before reporting for AT 1970, announced that he did not want to go to Annual Training because of hay fever, and requested that he be excused from attendance. He reported to the USAR Center at approximately 1000 hours on Friday, 21 August 1970, demanding such an excuse. Mr. Yacovelli, the AST of the Unit, called Valley Forge General Hospital, and scheduled an immediate consultation with the Clinic to determine the individual's physical status, and his availability to be physically qualified to attend AT 1970. Although the doctors at the Valley Forge General Hospital found that this individual has a case of hay fever, and should not be exposed to the elements of weeds, it was determined that he was eligible and qualified to attend AT 1970 with the Unit. After arriving at IGMR, Annville, Pa. for AT 1970, PVT Moxey immediately complained of the hay fever. Yet, while he apparently could not perform duties during scheduled training periods, he would play touch football, during break time and lunch periods, in the very same fields where he indicated he could not perform his military duties. The undersigned prohibited this extra curricular activity because he felt it would interfere with his alleged asthmatic condition. PVT Moxey then turned himself into the Post Hospital for hay fever. The hospital personnel could not find evidence of his alleged problems. They were most distressed with his actions and activities throughout his confinement at the hospital.

f. The undersigned strenuously denies that he used obscene language in PVT Moxey's presence. The undersigned has seen and been in too many incidents in both civilian and military life, and know the implications of careless talk. However, the undersigned did make it clear to PVT Moxey that his conduct was unbecoming of a soldier, and in violation of Army Regulations.

g. In addition, the undersigned points out that prior to his transferring to this Unit, but unknown to this unit at the time of his transfer, PVT Moxey's former Commanding Officer attempted to place him on Active Duty for poor attendance at drills.

h. Pvt Moxey's conduct in January and February 1971 is reminiscent of his previous behavior in this Unit. Papers necessary to document the previous behavior have mysteriously disappeared from his file. Since Annual Training 1970, PVT Moxey's file has been locked in a safe with only three (3) responsible personnel permitted to have access to it, or some necessary documents could conceivably be missing now.

i. PVT Moxey has not appealed through this Unit of Assignment or contracted the undersigned concerning an appeal or matters relative to his orders to Active Duty. He has sent copies of undated letters to the Commanding Officer, 304th CA Group, Philadelphia, Pa.

j. PVT Moxey is probably one of the most counseled, if not the most counseled individual in the US Army Reserve. This, coupled with his mental capability as proven by a degree awarded by Harvard University, proves that he knows what is required, and is expected of him.

k. This Command makes no attempt to show partiality to anyone. We try to be fair, be guided by regulations and treat all in the same manner. This can be attested to by the high morale and ratings of and within the Unit.

l. PVT Moxey, in the opinion of the undersigned, being a Harvard University graduate, having great abilities when *he elects to use them*, always elects to use, bend and change regulations and requirements to suit his own desires and wants. He expects and practically demands the US Army and the US Army Reserve to do this as evidenced by the manner in which he has handled this appeal. He has followed no regulations, gone out of channels, and again forced the US Army to change to meet his desires and dictates. This is further evidenced by a delay in his call to Active Duty.

m. In view of the above comments, and the fact that this individual did in fact, violate AR 135-91, in the form of being absent from assigned UTA, in the form of five (5) or more within a year, it is hereby requested that the appeal for individual's order to Active Duty be disapproved, and that the individual be ordered to Active Duty as originally requested, and as published by the appropriate orders by Headquarters, First United States Army.

EDGAR C. SEELY JR.
LTC CA-USAR
Commanding

165 W. Elm St.
Norristown, Pa.

Lt. Hqs Attorney
Hqs, 1st U.S. Army
Ft. George G. Meade, Md

Dear Lt. Hqs Attorney,

I request that copies of the comments made by the CO of the 4/16th CA unit on my appeal of his action to have me sent on active duty, plus copies of statements and documents submitted with the original request that I be activated be sent to me.

Sincerely yours,

Todd Mosley

DEPARTMENT OF THE ARMY
HEADQUARTERS, FIRST UNITED STATES ARMY
FORT GEORGE G. MEADE, MARYLAND 20755

AHAAG-CA 11 August 1971
SUBJECT: Active Duty Orders

PV2 Todd G. Moxey
155 West Elm Street
Norristown, Pennsylvania 19401

1. Your undated letter requesting copies of your unit commander's request for active duty orders and his indorsements of your appeal has been received. Your request has been reviewed by the Staff Judge Advocate Section, this headquarters. It has been determined that it would not be appropriate to provide you with the requested materials at this time. Please be advised, however, that in the event your appeal is disapproved at the Department of the Army level you will be supplied with a copy of all documents considered by the appeal board.

2. Your file is being forwarded this date to the Commanding General, US Army Reserve Personnel and Administration Center, 9700 Page Boulevard, St. Louis, Missouri 63132. If a final decision on your appeal has not been announced prior to 31 August 1971, your current active duty reporting date, your orders will be amended by this headquarters to show a later reporting date.

FOR THE COMMANDER:

ALAN L. ATTERBURY
1LT, AGC
Asst AG

DEPARTMENT OF THE ARMY
HEADQUARTERS, FIRST UNITED STATES ARMY
FORT GEORGE G. MEADE, MARYLAND 20755

AHAAG-CA 11 August 1971

SUBJECT: Appeal of Involuntary Active Duty
Moxey, Todd G., 203-34-2216

Commanding General
US Army Reserve Personnel & Administration Center
(ATTN: Mrs. Corey)
9700 Page Boulevard
St. Louis, Missouri 63132

1. Appeal of involuntary order to active duty submitted by PV2 Todd G. Moxey is forwarded for consideration under paragraph 20d, AR 135-91.

2. The appeal is based upon PV2 Moxey's several undated letters (TAB B).

3. Recommend disapproval. PV2 Moxey is charged with six unexcused absences accrued on 10 January 1971 (MUTA2) and 13, 14 February 1971 (MUTA4).

a. In his appeal PV2 Moxey states that he was suffering from a cold on 10 January and did not feel well enough to attend the meetings on that day. He claims that he did make an attempt to telephone the unit on 10 January to apprise the commander of his illness but states that the call was not answered. His appeal indicates that he made no additional effort to substantiate his alleged illness by providing appropriate affidavits or doctors certificates as required by paragraph 9, AR 135-91. Moreover, the fact that PV2 Moxey received the notification letter dated 10 January reminding him of this latter requirement indicates

that his failure to produce such documents occurred with full awareness of the consequent risk.

b. Likewise, it appears that PV2 Moxey was fully aware of the consequences of the course of action he adopted with regard to the 13, 14 February MUTA4. The believability of his claim that he was mistaken as to the date of the February MUTA4 is diminished by the fact that he failed to identify the person he claims told him that the MUTA4 was to be held on 20, 21 February and by the fact that he signed for receipt of the registered mail letter of 10 January advising him of the correct date of the next scheduled assembly. With his claim of honest and reasonable mistake as to the date of the February meeting rejected, PV2 Moxey's contention that it is unfair and excessive to charge four absences on 13, 14 February is without merit. As noted by the unit commander, PV2 Moxey was issued two sets of fatigues so that at least one would be available for duty wear. In view of this fact it would be difficult for the unit commander to excuse PV2 Moxey's failure to wear a presentable uniform to any of these scheduled assemblies.

c. PV2 Moxey's claims of unequal treatment with regard to equivalent training and uniform requirements also lack merit. The equivalent training experience of Charles Ogelsley is significantly different from PV2 Moxey's in that the request was submitted before the absences were charged. Clearly, requiring consideration of equivalent training requests made after an absence would seriously impair the enforcement provisions of AR 135-91. The claim that a Specialist Yadavia regularly wore civilian clothing to meetings also contains the explanation that the enlisted man had not been issued a duty uniform.

4. Your attention is directed to the undated letter from PV2 Moxey requesting copies of the original request for active duty orders and comments made by the unit commander on the appeal (TAB B). This headquarters has ad-

vised PV2 Moxey that such materials will be provided if and when this appeal is disapproved at Department of the Army level.

5. PV2 Moxey's current active duty reporting date is 31 August 1971. His orders will be amended to show a later reporting date if no decision has been made prior to 24 August 1971.

FOR THE COMMANDER:

4 Incl
as in Tab Directory

ALAN L. ATTERBURY
1LT, AGC
Asst AG

DEPARTMENT OF THE ARMY
OFFICE OF THE ADJUTANT GENERAL
U. S. ARMY RESERVE COMPONENTS PERSONNEL AND ADMINISTRATION CENTER
ST. LOUIS, MISSOURI 63132

AGUZ-PAD-VA Noxey, Todd G. 12 Oct 71
SSN 203-34-2216

MEMORANDUM FOR RECORD

SUBJECT: AR 135-91 DELAY APPEAL BOARD RECORD OF PROCEEDINGS

1. Pursuant to letter, Headquarters, Department of the Army, RCPAC, dated 13 September 1971 subject: "AR 135-91 Delay Appeal Board," a board of officers was convened at 0900 hours 15 September 1971 at St. Louis, Missouri. The Board met to review and make recommendations on the delay appeal (paragraph 20c(2), AR 135-91) of PV2 Todd G. Noxey, SSN 203-34-2216.

2. The following members of the Board were present:

MEDINA, TOMAS SSN 462-54-5412, CPT, AGC (President)
TOOLEY, WILLIAM M. SSN 245-14-1052, MAJ AGC (Recorder w/o vote)
WHITNEY, EARL J. SSN 026-14-7710, GS-11
O'CONNOR, PETER B. SSN 487-26-4510, GS-10

3. The other members of the Board were absent with the concurrence of the President and convening authority:

4. The Board members were polled to determine if any member had prior knowledge of this case that would prejudice his ability to render a fair and impartial decision. This poll revealed that no member of the quorum had any prior knowledge of the case.

AGUZ Form 1086
1 Aug 71

5. Findings: Having carefully considered the facts and documents submitted by PV2 Todd G. Maxey, SSN 203-34-2716 incidental to his delay appeal application the Board finds:

a. That the documentation submitted fails to qualify the applicant for mitigation or relief from his involuntary call to active duty.

b. A detailed analysis of this case reveals that the administrative factors required to support an involuntary call to active duty for unsatisfactory participation have been consummated. This review included examination of the petitioner's Military Personnel Records Jacket (DA Form 201); several undated letters of appeal for relief from call to active duty; and several forwarding command indorsements.

c. The tenor of the petitioner's appeal is directed toward justifying why he knowingly and willfully violated specific guidance concerning his unsatisfactory attendance. His stated extenuation was unanimously viewed as unsupported and unacceptable grounds for favorable consideration by this Board.

6. Recommendation(s): In view of the above findings, the Board recommends disapproval of PV2 Maxey's appeal from his involuntary order to active duty.

7. The Board adjourned at 1430 hours 7 October 1971.

THOMAS MEDINA, CPT AGC (President)

WILLIAM H. TANKEL, MAJ, AGC (Recorder w/o vote)

8. Dissenting Vote(s):
None

9. Action by Convening Authority:
The recommendation of the Board is approved.

BY ORDER OF THE SECRETARY OF THE ARMY:

W. C. SCARBOROUGH
Colonel, AGC
Deputy Commander

DISTRIBUTION:
Original - MPRJ
Copy - OMPF
Copy - RCPAC, PAD

AGUZ Form 1086 - 1 Aug 71

TODD G. MOXEY — CIVIL ACTION

v.

EDGAR C. SEELY, JR. and SECRETARY OF DEFENSE — NO. 71-2574

ORDER

AND NOW, this 7th day of April, 1972, it is hereby ORDERED that the above-captioned matter be reargued on Friday, May 19, 1972, as to the following issues:

(1) Whether the November 24, 1970 Bulletin issued by First Army Headquarters which amended AR 135-9120(e) by removing the right to a personal hearing was an authorized and legal change in "format" in view of AR 135-91(20)e, effective October 1, 1970, which gave a reservist the right to a personal hearing? Cf. *Higbee v. Laird*, 4 SSLR 3555, (D. N.J. Sept. 10, 1971).

(2) If the November 24, 1970 Bulletin in question did not effectively remove the right to a personal hearing, would Private Todd Moxey nonetheless be entitled to a personal hearing since the Delay Appeal Board did not consider his appeal until September 19, 1971, thus, after the June 1, 1971 amendment to AR 135-91(20)e which removed the right to a personal hearing?

(3) In the event this matter is remanded back to the United States Army for a personal hearing, what is the effect as to this petitioner of the language in AR 135-91 (12)e(2) which provides:

> ". . . after his notification and . . . that unless notified otherwise he [petitioner] is not required or authorized to attend unit assemblies or annual training (AT) while awaiting his entry on active duty and will be granted excused absence during the period involved."

If the Army failed to follow applicable procedures thereby necessitating Mr. Moxey's appeal to this Court, should he have credited to his total reserve obligation the time spent processing his appeal within the military and before this Court?

IT IS FURTHER ORDERED that the plaintiff's counsel file a supplementary brief on or before April 29, 1972, and that the Government file a reply brief on or before May 17, 1972.

BEFORE THE COURT:

A. Leon Higginbotham,
J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TODD G. MOXEY — CIVIL ACTION

v.

EDGAR C. SEELY, JR. and
SECRETARY OF DEFENSE — NO. 71-2574

HIGGINBOTHAM, J. — JUNE 27, 1972

OPINION AND ORDER

In this civil action, instituted by means of a rule to show cause on October 26, 1971, the plaintiff, Todd G. Moxey, asks this Court, *inter alia*, to (1) declare that plaintiff's performance in the United States Army Reserve Unit was not unsatisfactory, (2) issue an injunction restraining the defendants from ordering the plaintiff to active duty, and (3) declare 10 U.S.C. §673a and regulations thereunder unconstitutional. For the reasons appearing hereinafter, I hereby grant the Government's motion for summary judgment and dismiss the instant complaint.[1]

On February 18, 1966, Mr. Moxey enlisted in the United States Army Reserves and served, after attending his initial six months of basic training, until the period in question in this lawsuit, January and February of 1971. It should be noted that on November 14, 1970, plaintiff signed a "Statement of Reserve Agreement Understanding" which stated, *inter alia:*

* * *

"I understand that if I fail to attend prescribed unit training without proper authority or if because of

1. This matter was originally argued on December 3, 1971. It was listed for reargument and rebriefing on May 19, 1972 because certain dispositive issues had not originally been fully briefed.

change of residence, job interference or other reasons, I am unable to continue serving in a unit, I will be ordered to active duty for twenty-four (24) months less any period of active duty, active duty for training or annual field training which may have been served previously. Inactive duty training assemblies may not be counted against this period of active duty.

* * *

"I understand that absences from scheduled unit training assemblies or Annual Active Duty for Training may be authorized by the unit commander for reasons of sickness, injury, emergency, or other circumstances beyond my control when substantiated by affidavits or certified by a doctor or medical officer. Employment conflicts, overtime, schooling, and loss of income are not normally considered valid reasons for absence from training. Requests for authorized absence must be submitted in writing in advance unless illness or emergency does not provide sufficient time for submission, in which case, it must be submitted at the earliest practicable date.

"I understand that I will be ordered to active duty for a period which, when added to my prior service on active duty, active duty for training, annual field training or full time training duty, will total twenty-four (24) months if I fail to attend Annual Active Duty for Training or if I fail to participate satisfactorily by accruing in any one-year period a total of five or more unexcused absences from scheduled unit training assemblies. If I fail to attend a scheduled single unit training assembly (UTA) without proper authority I will be charged with one unexcused absence. If I fail to attend a multiple unit training assembly (MUTA) without proper authority, I will be charged with one unexcused absence for each UTA equivalent not attended. The maximum number of absences charge-

able for failure to attend consecutive MUTA assemblies will be 4 unexcused absences.

"I understand that a member present at a scheduled unit training assembly will not receive credit for attendance thereat unless he is in the prescribed uniform, presents a neat and soldierly appearance, and performs his assigned duties in a satisfactory manner as determined by the unit commander. When present at a unit training assembly and credit is not received as covered herein, I understand that an unexcused absence will be charged.

"I understand for the purpose of computing unexcused absences, the one-year period will begin on the date of the training assembly from which I am absent without proper authority and will end one year later. When longer than one year elapses from the date of such unexcused absence, it no longer will be counted and the new year period will begin on the date of the subsequent absence if any. Unexcused absences will remain charged to me if I am reassigned or am enlisted in another Reserve Component Unit."

On January 10, 1971, Mr. Moxey's Reserve Unit had both morning and afternoon training sessions scheduled which Mr. Moxey did not attend. On the same date as his absence, the Reserve Unit sent him a letter (which he received on January 12, 1971) advising him of his unexcused absences and informing Mr. Moxey that the next Reserve Meeting was to be held on the weekend of February 13, 14, 1971. It appears that while Mr. Moxey did in fact attend the Reserve Meeting scheduled for that February weekend, he did so in a uniform which in the opinion of his Commanding Officer, Lt. Col. Seely, was improper. Accordingly, Mr. Moxey was informed that the attendance at the meetings on February 13, 14, 1971 was recorded as "absent". Thus, because each day of training was the equivalent of two absences, Mr. Moxey had accumulated four more

unexcused absences bringing his total within a period just slightly over one month to six.[2]

The applicable Army regulations are issued pursuant to 10 U.S.C. §673a, which provides, *inter alia*:

> "(a) Notwithstanding any other provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who—
>
> (1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve;
>
> (2) has not fulfilled his statutory reserve obligation; and
>
> (3) has not served on active duty for a total of 24 months.
>
> (b) A member who is ordered to active duty under this section may be required to serve on active duty until his total service on active duty equals 24 months. If his enlistment or other period of military service would expire before he has served the required period under this section, it may be extended until he has served the required period."

The specific regulation in question is AR 135-91. That regulation defines "unsatisfactory performance" in paragraph 12 as "accruing" in a one year period five or more unexcused absences from scheduled unit training assemblies. AR 135-91 also specifies the procedures which the Army must follow in involuntarily activating any reservist whose performance falls within the proscribed ambit of the

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2. It should be noted that my Order of Dismissal follows the now well-established rule that courts should not review discretionary decisions of military authorities made within their valid jurisdiction. See e.g., Orloff v. Willoughby, 345 U.S. 83, 73 S.Ct. 534 (1953); Keister v. Resor, No. 71-1936 (3rd Cir. 5/15/72); O'Mara v. Zebrowski, 447 F.2d 1085 (3rd Cir. 1971); Ryan v. Barkley, No. 72-134 (E.D.Pa. 4/25/72).

regulations. The Regulation provides that upon an initial determination by a reservist's unit commander that his performance has been unsatisfactory, as defined above, pursuant to para. 12(d) the commander must determine if any "cogent or emergency reasons existed which prevented the member from attending". The commander is then required to notify the reservist of his determination and inform him of his right to appeal the unit commander's determination within fifteen days. The reservist is required to respond in writing for any delay in his active duty orders pending appeal. The regulation then permits an appeal to the area commander, in this case the First Army Headquarters, Fort Meade, Maryland. If the appeal is denied by the Area Commander, the appeal is then forwarded to a Delay Appeal Board, Fort Benjamin Harrison, Indiana. "The appeal procedure is not set out with crystal clarity in the regulation, but it appears that appeals are directed first to the area commander and then, if denied, are automatically forwarded for further consideration to the Commanding Officer, United States Army Reserve Components Personnel Center, Fort Benjamin Harrison, Indiana. (footnote omitted)" *O'Mara v. Zebrowski*, 447 F.2d 1085 (3rd Cir. 1971).[3]

The crucial issue in this case is what form the review by the Delay Appeal Board should take. The applicable regulation, AR 135-91 (20) e. now provides:

> "e. Appeal board. The Commanding Officer, U. S. Army Reserve Components Personnel Center, will convene an appeal board to determine findings and submit recommendations to him on denials of appeal

3. My independent examination of Private Moxey's service file (Exhibit G-1) and Appeal file (Exhibit G-2) reveals that the Army has followed its own regulations in processing Private Moxey's appeal. In addition, Private Moxey does not make the claim, clearly within the jurisdiction of a court, that the Army violated its own regulations. His claim is that the regulations themselves are invalid. Cf. Ryan v. Barkley, No. 72-134 (E.D.Pa. 4/25/72).

> of involuntary order to active duty submitted under this regulation. The board proceedings will be as prescribed by the Commanding Officer, U. S. Army Reserve Components Personnel Center. *The provisions of AR 15-6 will not be applicable to such proceedings.*" (emphasis added)

By expressly excluding the application of AR 15-6, the Army takes the position that the procedures in Regulation 15-6 which give the serviceman the right to a hearing (para. 6(1)), the right to counsel (para. 8), the right to be present and cross-examine witnesses (para. 11), the right to file a written brief (para. 17), and the requirement of written findings supported by substantial evidence (paras. 19, 20) do not apply. It is clear that as of the present the Army does not consider the application of AR 15-6 the necessary procedure for a hearing which would result in the involuntary activation of a reservist.

The Army's position was approved in a very recent opinion, *Keister v. Resor*, No. 71-1936, (3rd Cir. filed 5/15/72). In *Keister*, the Court of Appeals considered and rejected a claim that the procedures of AR 15-6 are required either constitutionally or by construction of the Army Regulations themselves. The Court reiterated in *Keister, supra*, that AR 135-91 is not constitutionally defective and reaffirmed *O'Mara v. Zebrowski*, 447 F.2d 1085 (3rd Cir. 1971) which stated:

> "The procedure of Army Reg. 135-91 unquestionably could be improved. Determinations of a rather summary character which substantially affect individuals are, however, an everyday occurrence in the military. It is not our function to decide what is best for enlisted reservists. The challenged procedure [AR 135-91] does permit a reservist to take the matter up with his unit commander, and it also permits an appeal in which the reservist has an opportunity to explain those facts pertinent to his case which he feels were not fully con-

sidered, and * * * include any additional appropriate evidence. * * *'" (citation and footnote omitted). Given the factual context in which this procedure operates, and the presumption of constitutionality that attaches to this statutorily authorized (footnote omitted) procedure, we are unable to conclude that the procedure is constitutionally defective." *O'Mara*, *supra*, 447 F.2d at 1090.

Further, the *Keister* court in expressly rejecting the claim that the procedures of AR 15-6 are required in an AR 135-91 activation order as a matter of statutory construction, stated the following:

". . . to encumber the determination required of a reservist's commander, obviously contemplated by AR 135-91 to be a reasonably routine one, with the provisions of AR 15-6 would not only be to broaden the latter's scope beyond its indicated parameters, but also to complicate the activation process as to render it a useless vehicle for the maintenance of military proficiency. In conclusion, then, we think that AR 15-6 cannot be construed to 'supplement' AR 135-91, and that the appellant is therefore not entitled to a full blown hearing from his unit commander before his activation. Consequently, the need for a hearing before the Delay Appeal Board having been correctly decided by the District Court and his unit commander having complied with AR 135-91, the appellant's second contention is, on all fronts, meritless."[4]

Thus, I must reject Private Moxey's claim that AR 135-91 as presently drafted, requires a hearing following the procedures of AR 15-6.

The remaining question is whether AR 135-91 requires a hearing pursuant to AR 15-6 because of the procedures employed by the Army in amending AR 135-91.

4. The District Court in *Keister* rejected a claim that a "full blown" hearing is required before the Delay Appeal Board. Keister v. Resor, No. 71-646, (E.D.Pa. 9/30/71) Slip Opinion at pp. 7-10.

As presently drafted, AR 135-91(20)e, *supra.*, specifically *excludes* the application of AR 15-6 to the involuntary activation of a reservist. However, the language which excludes the application of AR 15-6 was added by means of an amendment to the regulation dated April 8, 1971 to be effective on June 1, 1971. *Before* the April change (effective June 1, 1971) AR 135-91(20)e provided:

> "The Commanding Officer, U. S. Army Reserve Components Personnel Center will convene a board of officers to determine findings and submit recommendations on denials of appeal of involuntary order to active duty submitted under this regulation. *The board will follow procedures as set forth in AR 15-6.* The *format* of the board proceeding will be prescribed by the Commanding Officer, U.S. Army Reserve Components Personnel Center." (emphasis added)

However, under the authority given to the Commanding Officer to prescribe the "format" of the proceedings before the Delay Appeal Board, the Commanding Officer previously had issued a bulletin on November 24, 1970 which effectively altered the procedure from an oral hearing to the current written appeal.

The Bulletin of November 24, 1970 was issued by First Army Headquarters following orders sent to First Army Headquarters by the Office of Personnel Operations at Fort Benjamin Harrison, Indiana. The language of the Bulletin issued by First Army Headquarters was sent by means of a "message change" to the regulations in November of 1970. The authority for issuing such a "message change" is supplied by AR 310-3 ¶1-12 which provides:

> "Under the most urgent circumstances, interim changes may be transmitted by means of an electrical message."

It is clear that the Army's use of the "message change" procedure indicates a determination by the Army that the instant change (removing the applicability of AR 15-6 to the

AR 135-91 call-up procedures) was considered to be "urgent". Thus, a federal court cannot "second guess" such a discretionary determination by the Army as to what is or is not "urgent."[5] Accordingly, I must conclude that the "message change" and First Army Bulletin (as approved by the Adjutant General) effectively amended AR 135-91 by excluding the applicability of AR 15-6. Thus, at the time Private Moxey began his appeal processing in February of 1971, he had no right to a personal hearing pursuant to AR 15-6 either before his unit commander or the Delay Appeal Board. *Keister v. Resor, supra.* In addition, it is clear that in October of 1971 when the Delay Appeal Board considered and rejected Private Moxey's appeal that he had no right to an AR 15-6 hearing before that Board. For all the above reasons, I reject Private Moxey's claim that activation requires the "full blown" hearing described in AR-6.

One issue raised by petitioner remaining for my adjudication, is whether 10 U.S.C. §673a, *supra*, is unconstitutional presumably as "cruel and unusual punishment." It is well-settled that involuntary activation is not "penal" in nature even though the result of an activation order may be to extend the reservist's original enlistment period.[6]

> "The primary purpose of involuntary activation appears to be to maintain the military proficiency that is otherwise maintained by attendance at unit hearing assemblies". *O'Mara v. Zebrowski*, 447 F.2d, 1085, 1089 (3rd Cir. 1971).

Thus, Private Moxey's claim that 10 U.S.C. §673a is unconstitutional must likewise fall.

In conclusion, the Army is now free to activate Private Moxey and to extend his period of enlistment as mandated by 10 U.S.C. §673a. The length of his active duty tour would not be affected by AR 135-91(12)e(2) which provides:

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5. AR 310-3, ¶1-7; see cases cited note 2, *supra*.

6. *See e.g.*, Keister v. Resor, No. 71-1936 (3rd Cir. 5/15/72) Slip Opinion at p. 8; O'Mara v. Zebrowski, 447 F.2d 1085 (3rd Cir. 1971); Fox v. Brown, 402 F.2d. 837 (2nd Cir. 1968).

". . . after his notification and . . . that unless notified otherwise he [petitioner] is not required or authorized to attend unit assemblies or annual training (AT) while awaiting his entry on active duty and will be granted excused absence during the period involved."

The above regulation must be read simply to inform a reservist that while awaiting activation he may not attend reserve meetings and will be granted excused absences. However, the regulation does not modify 10 U.S.C. §673a which permits an extension of total enlistment while on active duty to equal a total of 24 months active duty time. Finally, any claim that Private Moxey's active duty period is excessive may be processed while serving on active duty. *Fox v. Brown*, 402 F.2d 837, 840 (2nd Cir. 1968).

For all the above reasons, the government's motion for summary judgment is granted and the complaint dismissed.

ORDER

AND NOW, this 27th day of June, 1972, it is hereby ORDERED that the Government's Motion for Summary Judgment is GRANTED and the complaint in this matter is DISMISSED.

It is further ORDERED that the stay of activation entered on October 26, 1971 is hereby VACATED.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TODD G. MOXEY : CIVIL ACTION

v.

EDGAR C. SEELY, JR. and
SECRETARY OF DEFENSE : NO. 71-2574

ORDER

In my Opinion and Order of June 27, 1972 dismissing Mr. Moxey's complaint, I placed substantial reliance on *Keister v. Resor*, No. 71-1936 (3rd Cir. May 15, 1972). The Court of Appeals for the Third Circuit has entered a stay of activation in the *Keister* case pending disposition of Mr. Keister's petition for certiorari. In view of these unusual circumstances I enter the following Order:

AND NOW this 12th day of July, 1972, upon consideration of plaintiff's motion for a stay of activation pending appeal, it is hereby ORDERED that the defendants, their agents, and all persons acting in concert with them are RESTRAINED from ordering the plaintiff to active duty pending final disposition of this case, (unless otherwise ordered by the Court of Appeals).

BY THE COURT:

A. Leon Higginbotham, Jr.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1729

TODD G. MOXEY, *Appellant*

v.

EDGAR C. SEELY, JR., and SECRETARY OF DEFENSE,
Appellees

(D. C. Civil Action No. 71-2574)

Appeal from the United States District Court for the Eastern District of Pennsylvania.

Argued September 26, 1973

Before SEITZ, *Chief Judge*, HUNTER and WEIS, *Circuit Judges*

John David Egnal
Egnal and Egnal
Attorneys for Appellant

Harrington Wood, Jr.
Assistant Attorney General
Robert E.J. Curran
United States Attorney
Robert E. Kopp
Barbara Herwig
Attorneys for Appellees

JUDGMENT ORDER

Appellant is an Army reservist who has been involuntarily placed on active duty for sixteen months because he exceeded the permissible number of unexcused absences from Army reserve drills.

He contends that the district court erred in failing to find:

1) that the decisions of the appellees in activating him were erroneous, arbitrary and beyond their permissible ground of discretion.

2) that his activation was procedurally defective because,

a) he was unconstitutionally deprived of the right to review and respond to adverse documents considered in the Army's appeal procedure.

b) the Army failed to follow its applicable procedures.

c) the appeal board failed to give his case meaningful consideration.

3) that his involuntary activation is cruel and unusual punishment.

After considering these contentions,

It is ORDERED and ADJUDGED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

James Hunter, III, *Circuit Judge*

Date: Oct. 11, 1973

Attest:

Thomas F. Quinn, Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1729

TODD G. MOXEY *Appellant*

v.

EDGAR C. SEELY, JR., and SECRETARY OF DEFENSE,
Appellees

SUR PETITION FOR REHEARING

Present SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Dated: November 7, 1973 James Hunter, III, Judge

ARMY REGULATION
No. 135-91

HEADQUARTERS
DEPARTMENT OF THE ARMY

RESERVE COMPONENTS

POLICIES AND PROCEDURES GOVERNING SATISFACTORY PARTICIPATION

C 7, AR 135-91 — 25 March 1970

20. Appeals. *a. General.* An individual who has been denied a requested discharge or delay in order to active duty may appeal such denial. The appeal will be submitted within 15 days of the member's receipt of a denial; it will explain those facts pertinent to his case which he feels were not fully considered, and may include any additional appropriate evidence which the applicant may wish to present.

b. How submitted. Requests for appeals will be submitted through the unit commander to the commander having authority to approve discharges or delays as prescribed in paragraphs 16*b* and 19*a* as appropriate.

c. Authority to act on appeals. The approving authority may act on such appeals when the decisions are favorable to the individual concerned. When denial of an appeal is indicated, however, he will forward the request and pertinent records, together with his recommendations, to Headquarters, Department of the Army for final determination as follows:

(1) *Denial of appeal for discharge.*

(*a*) State adjutants general will forward denial of appeals for discharge to the Chief, Office of Reserve Components, through Chief, National Guard Bureau, Department of the Army, Washington, DC 20310.

★(*b*) Agencies of Headquarters, Department of the Army, area commanders and CG, USAAC, will forward denial of appeals for discharge to Chief, Office of Reserve Components, through Chief, Army Reserve, Department of the Army, Washington, DC 20310.

(2) *Denial of appeal for delay.*

(*a*) State adjutants general will forward denial of appeals for delay to the Commanding Officer, U.S. Army Reserve Components Personnel Center, Fort Benjamin Harrison, IN 46249, through Chief, National Guard Bureau, Department of the Army, Washington, DC 20310 for processing under AR 601-25.

★(*b*) Area commanders and CG, USAAC, will forward denial of appeals for delay to the Commanding Officer, U.S. Army Reserve Components Personnel Center, Fort Benjamin Harrison, IN 46249 for processing under AR 601-25.

d. Appeal of involuntary order to active duty. If an individual appeals his involuntary order to active duty for reasons other than those specified in this regulation, the denial of such appeal will be forwarded to CO, USARCPC in accordance with *c*(2)(*a*) or (*b*) above as appropriate. The member's DA Form 201 (Military Personnel Records Jacket, U.S. Army) will be forwarded in all appeal cases.

e. Board of officers. The Commanding Officer, U.S. Army Reserve Components Personnel Center will convene a board of officers to determine findings and submit recommendations on denials of appeal of involuntary order to active duty submitted under this regulation. The board will follow procedures as set forth in AR 15-6. The format of the board proceedings will be prescribed by the Commanding Officer, U.S. Army Reserve Components Personnel Center.

C 9, AR 135-91 — 8 April 1971

★*e. Appeal board.* The Commanding Officer, U.S. Army Reserve Components Personnel Center, will convene an appeal board to determine findings and submit recommendations to him on denials of appeal of involuntary order to active duty submitted under this regulation. The board proceedings will be as prescribed by the Commanding Officer, U.S. Army Reserve Components Personnel Center. The provisions of AR 15-6 will not be applicable to such proceedings.

A59

AR 135–91
*C 6

CHANGE
No. 6

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, DC, *20 January 1970*

RESERVE COMPONENTS

POLICIES AND PROCEDURES GOVERNING SATISFACTORY PARTICIPATION

Effective 30 March 1970

This change prescribes procedures for processing members who enter an AWOL status from initial ACDUTRA; provides for notifying a member of his right to appeal involuntary order to active duty; authorizes the CO, USARCPC to prescribe the format of board proceedings in appeal cases; and provides procedures to authorize certain enlisted members to fulfill bona fide, temporary, nonmilitary oversea obligations.

AR 135–91, 11 June 1968, is changed as follows:

1. New or changed material is indicated by a star.
2. Remove old pages and insert new pages as indicated below.

Remove pages—	*Insert pages—*
7 through 12.2	7 through 12.2
17 and 18	17 through 18.1
D–1	D–1

3. File this change sheet in front of the publication for reference purposes.

The proponent agency of this regulation is the Office of Personnel Operations. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications) to Commanding Officer, U.S. Army Reserve Components Personnel Center, ATTN: RCPL, Fort Benjamin Harrison IN 46249.

By Order of the Secretary of the Army:

W. C. WESTMORELAND,
General, United States Army,
Chief of Staff.

Official:
KENNETH G. WICKHAM,
Major General, United States Army,
The Adjutant General.

Distribution:
To be distributed in accordance with DA Form 12–9 requirements for AR, Reserve Components:
Active Army: C (quan rqr block No. 226).
ARNG: A (quan rqr block No. 224).
USAR: A (quan rqr block No. 224).

*This change supersedes DA message RCPL 071400Z Nov 69 (U), subject, Interim Change to AR 135–91 (Change 5).

AR 135-91
C 9

CHANGE
No. 9

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, DC, 8 April 1971

RESERVE COMPONENTS

POLICIES AND PROCEDURES GOVERNING SATISFACTORY PARTICIPATION

Effective 1 June 1971

This change authorizes equivalent training when a member's employer schedules career training which conflicts with regularly programed unit drills; provides for the retention of DD Form 1 at Army or State headquarters until orders to involuntary active duty have been issued; clarifies separation from active duty as the result of unsatisfactory participation; provides for amendment or revocation of active duty orders when appeal action is in process; redefines the procedures for USARCPC appeal boards; and clarifies procedures for reassigning members who become disqualified for further airborne training.

AR 135-91, 11 June 1968, is changed as follows:

1. New or changed material is indicated by a star.
2. Remove old pages and insert new pages as indicated below:

Remove pages	*Insert pages*
9 through 12.1	9 through 12.2
15 through 22	15 through 23

3. File this change sheet in front of the publication for references purposes.

The proponent agency of this regulation is the Office of Personnel Operations. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications) direct to Commanding Officer, U.S. Army Reserve Components Personnel Center, ATTN: RCPL, Fort Benjamin Harrison, IN 46249.

By Order of the Secretary of the Army:

W. C. WESTMORELAND,
General, United States Army,
Chief of Staff.

Official:

VERNE L. BOWERS,
Major General, United States Army,
The Adjutant General.

Distribution:

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Active Army: C (qty rqr block No. 226).
ARNG: A (qty rqr block No. 224).
USAR: A (qty rqr block No. 224).

TAGO 587A—March 470-472°—72

PAGE 1 OF 2 — UU — DATE 1314302 — 80V

FROM: DA OPO USARCPC FT [illegible] RCPL-52

TO: CGUSAONE FT [illegible] (AIRMAIL)

CGUSATWO FT [illegible] (AIRMAIL)

CGUSAFOUR FT SAM HOUSTON TX (AIRMAIL)

CGUSAFIVE FT SHERIDAN IL (AIRMAIL)

CGUSASIX SFRAN CA (AIRMAIL)

CGUSARAL (AIRMAIL)

CINCUSARPAC (AIRMAIL)

CGUSARHAW SCHOFIELD BKS HI (AIRMAIL)

COMUSARSO (AIRMAIL)

CNGB (AIRMAIL)

CGUSAAC STL MO (AIRMAIL)

INFO: CINCUSAREUR (AIRMAIL)

CCCONARC (AIRMAIL)

UNCLAS

ACTCOM

RCPL

Subject: Appeal of Involuntary Order to Active Duty for Unsatisfactory Participation.

DISTR:

CORC, CAR, TAG-OSARVA, USARCPC LNO, USCONARC LNO, OSDEX, ARBCMR, ARADCOM

Mr. R. A. [illegible], ICIL, X 3720

JOINT

2 of 2

DOWN

MESSAGE HANDLING INSTRUCTIONS

FROM:

TO:

Questions have been raised concerning the policy of not authorizing personal appearances before boards considering appeal of involuntary order to active duty for unsatisfactory participation.

2. In order to clarify the policy, paragraph 20e, AR 135-91, will be amended by printed change to read as follows:

"e. Appeal Board. The Commanding Officer, US Army Reserve Components Personnel Center, will convene an appeal board to determine findings and submit recommendations to him on denials of appeal of involuntary order to active duty submitted under this regulation. The board proceedings will be as prescribed by the Commanding Officer, US Army Reserve Components Personnel Center. The provisions of Army Regulation 15-6 will not be applicable to such proceedings."

3. The above provisions are effective immediately.

4. Request CNGB advise State AG's accordingly.

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0

DISTR:

PRIORITY AND MAIL TITLE, OFFICE SYMBOL AND PHONE

SPECIAL INSTRUCTIONS

SECURITY CLASSIFICATION

A63

DEPARTMENT OF THE ARMY 1A CIR 135-7
HEADQUARTERS FIRST UNITED STATES ARMY
FORT GEORGE G MEADE MARYLAND 20755

EXPIRES 24 NOVEMBER 1971

CIRCULAR
NUMBER 135-7

24 November 1970

RESERVE COMPONENTS

APPEAL OF INVOLUNTARY ORDER TO ACTIVE DUTY FOR UNSATISFACTORY PARTICIPATION

Department of the Army, OPO, RCPC message 131430Z Nov 70, subject as above, is quoted in part for information and compliance:

"1. Questions have been raised concerning the policy of not authorizing personal appearances before boards considering appeal of involuntary order to active duty for unsatisfactory participation.

"2. In order to clarify the policy, paragraph 20e, AR 135-91, will be amended by printed change to read as follows:

'e. Appeal Board. The Commanding Officer, US Army Reserve Components Personnel Center, will convene an appeal board to determine findings and submit recommendations to him on denials of appeal of involuntary order to active duty submitted under this regulation. The board proceedings will be as prescribed by the Commanding Officer, US Army Reserve Components Personnel Center. The provisions of Army Regulation 15-6 will not be applicable to such proceedings.'

"3. The above provisions are effective immediately." (AHAAG-CA)

FOR THE COMMANDER:

OFFICIAL:

R. G. CICCOLELLA
Major General, GS
Chief of Staff

H. J. WEBB
Colonel, AGC
Adjutant General

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U.S. ARMY RECEPTION AND PROCESSING CENTER
FORT BENJAMIN HARRISON
INDIANAPOLIS, INDIANA 46249

AGAM-S 22 March 1971

MEMORANDUM FOR RECORD

SUBJECT: AR 135-91 DELAY APPEAL BOARD RECORD OF PROCEEDINGS

1. Pursuant to letter, Headquarters, Department of the Army, HQPC, dated [illegible] January 1971, subject: "AR 135-91 Delay Appeal Board," a Board of Officers was convened at [illegible] hours 25 February 1971 at Fort Benjamin Harrison, Indiana. The Board met to review and make recommendations on the delay appeal (paragraph 20c(2) & 20d, AR 135-91), of PVT Richard W. Melvin, RA, 268-[illegible].

2. The following members of the Board were present:

[illegible], Matthew M., CPT, 521-[illegible], MSC, as (President)
[illegible], Albert D., CPT, USA, [illegible], Inf, [illegible] (Recorder w/o vote)
[illegible], Nathaniel R. S., CPT, USA, 447-[illegible], CAC, AUS
[illegible], Ronald D., CPT, USA, [illegible], MI, [illegible]

3. The other members of the Board were absent with the concurrence of the President and convening authority.

4. The Board members were polled to determine if any member had prior knowledge of this case that would prejudice his ability to render a fair and impartial decision. No member of the quorum was disqualified as a result of this poll.

5. Findings: Having carefully considered the facts and documents submitted by [illegible] incidental to his delay appeal application the Board finds: That the documentation submitted fails to justify the applicant for exemption or relief from the involuntary call to active duty.

6. A detailed analysis of this case does not show that the administrative [illegible] required to support an affirmative call to active duty for voluntary reserve participation under these circumstances. This review includes consideration of the petitioner's statement, [illegible] (DA Form 2704); [illegible] and [illegible] letter of appeal for relief from call to active duty; and [illegible] information.

5. [illegible] in addition to the [illegible] may be [illegible] of the [illegible]. After careful consideration, the [illegible] unfavorable. [illegible] in this case may properly be viewed as [illegible] and [illegible] and favorable conduct [illegible] by this board.

6. Recommendation(s): In view of the findings in paragraph 5, the Board recommends disapproval of [illegible]'s appeal from his involuntary order to active duty.

7. The Board adjourned at 1145 hours, 5 March 1971.

S/RAYMOND M. WALTER
RAYMOND M. WALTER, LTC, AR (PRESIDENT)

S/RICHARD D. HERMAN
RICHARD D. HERMAN, LTC, INF (MEMBER)

8. Dissenting Vote(s): None.

9. Action by Convening Authority: The recommendation of the Board is approved.

BY ORDER OF THE SECRETARY OF THE ARMY:

S/JOHN M. HOFFMAN
John M. Hoffman
Colonel, AGC
Commanding

Distribution:
Original - TAG File.
Copy - Field 201 File.
Copy - USARCPC File.

[illegible], RCPC PL
Rev 1 Dec 70 131

DEPARTMENT OF THE ARMY
U.S. ARMY RESERVE COMPONENTS PERSONNEL CENTER
FORT BENJAMIN HARRISON
INDIANAPOLIS, INDIANA 46249

RCPA-S

30 July 1971

MEMORANDUM FOR RECORD

SUBJECT: AR 135-91 DELAY APPEAL BOARD RECORD OF PROCEEDINGS

1. Pursuant to letter, Headquarters, Department of the Army, RCPC, dated 1 July 1971 subject: "AR 135-91 Delay Appeal Board," a Board of Officers was convened at 0845 hours 7 July 1971 at Fort Benjamin Harrison, Indiana. The Board met to review and make recommendations on the delay appeal (paragraph 20c(2) & 20d, AR 135-91), of PVT Leicester F. Caruso, 192-34-6865.

2. The following members of the Board were present:

FRENCH, JOHN W., SSAN 264-28-3229, COL, AD (PRESIDENT)
DOUGLAS, LAWRENCE W., SSAN 361-26-7150, LTC, Inf
MERIAUX, RICHARD D., SSAN 519-38-3568, MAJ, Inf (RECORDER W/O VOTE)
STEVENS, KEPSCHELL L. F., SSAN 447-14-0065, CW4, AUS

3. The other members of the Board were absent with the concurrence of the President and convening authority.

4. The Board members were polled to determine if any member had prior knowledge of this case that would prejudice his ability to render a fair and impartial decision. No member of the quorum was disqualified as a result of this poll.

5. Findings: Having carefully considered the facts and documents submitted by PVT Leicester F. Caruso, 192-34-6865, incidental to his delay appeal application the Board finds: that the documentation submitted fails to qualify the applicant for mitigation or relief from his involuntary call to active duty.

a. A detailed analysis of this case reveals that the administrative factors required to support an involuntary call to active duty for unsatisfactory participation have been consummated. This review included examination of the petitioner's Military Personnel Records Jacket (DA Form 201); 2 June 71 letter of appeal for relief from call to active duty; and several forwarding command indorsements.

OPO, RCPC 7L
Rev 1 Dec 70 131

b. The tense of the petitioner's appeal is directed toward justifying he knowingly and willfully violated specific guidance concerning his atisfactory attendance. His stated extenuation was unanimously viewed as upported and unacceptable grounds for favorable consideration by this rd.

////////////////////////NOTHING FOLLOWS////////////////////////////////

Recommendation(s): In view of the findings in paragraph 5, the Board ommends disapproval of PVT Caruso's appeal from his involuntary order to tive duty.

The Board adjourned at 1540 hours. 21 July 1971.

S/JOHN W. FRENCH
JOHN W. FRENCH, COL, AD (PRESIDENT)

S/RICHARD D. MERIAUX
RICHARD D. MERIAUX, MAJ, Inf
(RECORDER)

Dissenting Vote(s): None.

Action by Convening Authority: The recommendation of the Board is approved.

Y ORDER OF THE SECRETARY OF THE ARMY:

S/JOHN H. HOFFMAN
JOHN H. HOFFMAN
Colonel, ADA
Commanding

istribution:
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Copy - USARCPC File.

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5. Findings: Having carefully considered the facts and documents submitted by PVT John C. O'Hara, 207-34-3118, incidental to his delay appeal application the Board finds: that the documentation submitted fails to qualify the applicant for mitigation or relief from his involuntary call to active duty.

a. A detailed analysis of this case reveals that the administrative factors required to support an involuntary call to active duty for unsatisfactory participation have been consummated. This review included examination of the petitioner's Military Personnel Records Jacket (DA Form 201); 3 April 1970 letter of appeal for relief from call to active duty; and several forwarding command indorsements.

b. The tense of the petitioner's appeal is directed towards justifying why he knowingly and willfully violated specific guidance concerning his unsatisfactory attendance. His stated extenuation was unanimously viewed as unsupported and unacceptable grounds for favorable consideration by this Board.

c. The Board found that petitioner failed to attend six unit assemblies on the following dates: 8 November 1969 (2); 9 November 1969 (2); 7 December 1969 (2); and his allegation that he had been told not to attend unit assemblies was unsubstantiated.

////////////////////////////NOTHING FOLLOWS////////////////////////////

6. Recommendation(s): In view of the above findings, the Board recommends disapproval of PVT O'Hara's appeal of involuntary active duty.

5. Findings: Having carefully considered the facts and documents submitted by Private Arthur [illegible] incidental to his delay appeal application the Board finds: [illegible] documentation submitted fails to qualify the applicant for mitigation or relief from his involuntary call to active duty.

a. A detailed analysis of this case reveals that the administrative factors required to support an involuntary call to active duty for unsatisfactory participation have been accomplished. This review included evaluation of the petitioner's 3 March 1970 letter of appeal for relief from call to active duty and several forwarding command indorsements.

b. The tone of the petitioner's appeal is directed towards justifying why he knowingly and willfully violated specific guidance concerning his unsatisfactory attendance. His stated extenuation was unanimously viewed as unsupported and unacceptable grounds for favorable consideration by this Board.

//

6. Recommendation(s): In view of the above findings, the Board recommends disapproval.

5. Findings: Having carefully considered the facts and documents submitted by PVT Eugene J. Drennen, 195-40-4523, incidental to his delay appeal application the Board finds: that the documentation submitted fails to qualify the applicant for mitigation or relief from his involuntary call to active duty.

a. A detailed analysis of this case reveals that the administrative factors required to support an involuntary call to active duty for unsatisfactory participation have been consummated. This review included examination of the petitioner's Military Personnel Records Jacket (DA Form 201); 25 May 1970 letter of appeal for relief from call to active duty; and several forwarding command indorsements.

b. The tense of the petitioner's appeal is directed towards justifying why he knowingly and willfully violated specific guidance concerning his unsatisfactory attendance. His stated extenuation was unanimously viewed as unsupported and unacceptable grounds for favorable consideration by this Board.

////////////////////////////////NOTHING FOLLOWS////////////////////////////////

6. Recommendation(s): In view of the above findings, the Board recommends disapproval of PVT Drennen's appeal from his involuntary order to active duty.

No. 73-1186

APR 23 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

TODD G. MOXEY, PETITIONER

v.

EDGAR C. SEELY, JR. AND
SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

CARLA A. HILLS,
Assistant Attorney General,

ROBERT E. KOPP,
BARBARA L. HERWIG,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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NO. 73-1186

TODD G. MOXEY, PETITIONER

v.

EDGAR C. SEELY, JR. AND
SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The judgment-order of the court of appeals (Pet. App. A55-A56) is noted at 485 F. 2d 680. The opinion of the district court (Pet. App. A44-A53) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1973; a timely petition for rehearing was denied on November 7, 1973. The petition for a writ of certiorari was filed on February 2, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the federal courts should review the discretionary decision of military authorities ordering a reservist to active duty as a result of his incurring six unexcused absences.

2. Whether the procedures followed in ordering petitioner to active duty afforded him due process.

3. Whether the availability of alternative methods of dealing with unsatisfactory reservists renders petitioner's activation order invalid.

STATUTE AND REGULATION INVOLVED

10 U.S.C. 673a.

(a) Notwithstanding any other provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who—

(1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve;

(2) has not fulfilled his statutory reserve obligation; and

(3) has not served on active duty for a total of 24 months.

Army Regulation 135-91

5*d*. Satisfactory participation is defined as follows:

* * * * *

(2) Attendance at all scheduled unit training assemblies as a member of a paid drill unit of the Army National Guard or Army Reserve, unless excused by proper authority as provided herein.

A member present at a scheduled unit training assembly will not receive credit for attendance thereat unless he is in the prescribed uniform, presents a neat and soldierly appearance, and performs his assigned duties in a satisfactory manner as determined by the unit commander. When a member attends a unit training assembly and does not receive credit therefor, he will be charged with an unexcused absence and the unit commander will follow the same procedures applicable when a member fails to attend a unit training assembly.

* * * * *

12. *Unexcused absences from unit training assemblies.* A member fails to participate satisfactorily when he accrues in any 1-year period a total of five or more unexcused absences from scheduled unit training assemblies * * *.

STATEMENT

Petitioner, an Army Reservist, was ordered to active duty for failing to participate satisfactorily in his unit by incurring six unexcused absences within a one-year period.

Petitioner enlisted in the Army Reserves in 1966, and subsequently signed a "Statement of Reserve Agreement Understanding" which stated, *inter alia,* that he understood that he was subject to being ordered to active duty for failing to attend unit training without proper authority, and that a member attending a unit training assembly may not receive credit for attendance if he is not in the prescribed uniform as determined by the unit commander (Pet. App. A44-A46).

On January 10, 1971, petitioner was absent from two scheduled training assemblies of his reserve unit, allegedly because of a severe cold. On the same day, the Reserve Unit sent him a letter advising him of his unexcused absences, informing him of the method to be followed to have the absences authorized, and informing him that the next Reserve meeting was to be held on the weekend of February 13 and 14, 1971. Although petitioner attended this meeting, he was credited with four unexcused absences for appearing in a uniform which his commanding officer determined to be improper. As a result of incurring six unexcused absences within a one-year period, petitioner was ordered to active duty.

Petitioner appealed this order under Army Regulation 135-91. Although he did not appeal through his unit of assignment as he was instructed to do (Pet. App. A6), his appeal was considered and denied by each level up to and including the Delay Appeal Board.

Petitioner thereupon sought review of his activation orders in the district court, claiming that he should not have been activated because his absences due to illness should have been excused and he was denied due process in the Army proceedings which resulted in his activation orders. The district court held that petitioner had been properly activated and granted summary judgment for the government (Pet. App. A44-A53). On appeal, the Third Circuit affirmed, 458 F. 2d 680 (Pet. App. A55-A56).

ARGUMENT

The decision of the court of appeals is correct and no issue warranting further review is presented.

1. It is well settled that the federal courts will not review discretionary decisions of the military

authorities made within their proper jurisdiction. *Orloff* v. *Willoughby*, 345 U.S. 83. Both acts complained of here—awarding petitioner six unexcused absences and ordering him to active duty—are within the jurisdiction of the military. See *O'Mara* v. *Zebrowski*, 447 F. 2d 1085 (C.A. 3); *Keister* v. *Resor*, 462 F. 2d 471 (C.A. 3), certiorari denied, 409 U.S. 894.

10 U.S.C. 673a provides that a member of the Reserves who is not participating satisfactorily in his Reserve unit may be ordered to active duty. Army regulations issued pursuant to that section provide that the unit commander is to decide whether the reservist is participating satisfactorily and that a reservist is not participating satisfactorily unless he is in the prescribed uniform, AR 135-91(5)(d)(2). They further provide that accural of five or more unexcused absences from scheduled unit training assemblies in a one-year period constitutes unsatisfactory performance, AR 135-91(12).

Moreover, even though the Army's actions complained of are discretionary and not subject to review by the courts, they were plainly correct. Petitioner contends that his absences due to illness should have been excused. However, petitioner failed to follow the applicable regulations in obtaining excuses.

A unit directive allows members who are too ill to attend a training session to telephone the unit and obtain a medically excused absence (C. A. App. 16a). Although petitioner did make one attempt to telephone his unit, nothing in the directive excuses him from actually reporting his illness as opposed to attempting to report it. Moreover, the letter informing petitioner of his unexcused absences set out the procedure to be

followed to obtain excused absences, *i.e.*, submission of affidavits or medical certificates within 14 days of the absence. Petitioner failed to do anything about the absences until 34 days after the absence (Pet. App. A10-A11).

Likewise, the decision to award four unexcused absences for the drills at which petitioner appeared without the proper uniform was within the commander's discretion and was correct. Petitioner was notified by mail following his first two absences of the date of the next drill. His excuse that his uniform was at the cleaners because he was not aware of the date of the training assembly is thus clearly insufficient.

2. Petitioner's other claims are similarly without merit.

Petitioner was not entitled to a hearing under AR 15-6 in his appeal of his orders to active duty. AR 135-91, paragraph 20, under which petitioner claims the right to a hearing, was amended by a Department of the Army message dated November 13, 1970 (Pet. App. A61-A62), prior to petitioner's appeal in February of 1971. This change was later incorporated in AR 135-91, Change 9, effective June 1, 1971. The message change of November 1970 was clearly competent to accomplish the change in regulation. See *Pifer* v. *Laird,* 328 F. Supp. 649 (N.D. Cal.), followed by *Cobb* v. *Laird,* 329 F. Supp. 780 (N.D. Cal.). Petitioner's construction of the language of the message is unsound. No message change would have been issued had the Army only announced a proposed change. Indeed, the third paragraph of the message announces that the changes "are effective immediately" (Pet. App. A62).

Moreover, denial of a hearing before the appeal board, unless provided by the regulations, is not a denial of due process. *Keister* v. *Resor, supra; O'Mara*

v. *Zebrowski, supra; Crotty* v. *Kelly*, 443 F. 2d 214 (C.A. 1); *Ansted* v. *Resor*, 437 F. 2d 1020 (C.A. 7), certiorari denied, 404 U.S. 827. Petitioner voluntarily joined the Army Reserves and understood he was subject to activation if he did not participate satisfactorily in his unit's duties (Pet. App. A44-A46).

Nor do the other alleged infirmities amount to a denial of due process. Both *Gonzales* v. *United States*, 348 U.S. 407, and *Crotty* v. *Kelly*, 443 F. 2d 214 (C.A. 1), involved the determination of whether the plaintiffs were entitled to conscientious objector status, a question which appropriately has been given closer scrutiny than the activation of reservists. Once an individual has voluntarily elected to fulfill his military obligation by enlisting in the Reserves, the only demand of due process is that the Army comply with its own regulations, *Keister* v. *Resor, supra*, 462 F. 2d at 474. Petitioner here makes no claim that the Army failed to follow its own regulations in denying petitioner access to documents in his file. Accordingly, the Army's procedure here was properly upheld.[1]

3. Finally, the availability to the Army of other methods of dealing with unsatisfactory reservists does not render involuntary activation unconstitutional. It is well settled that involuntary activation of a reservist for unsatisfactory performance is not cruel and unusual punishment. See *Keister* v. *Resor, supra; O'Mara* v. *Zebrowski, supra; Fox* v. *Brown*, 402 F. 2d 837 (C.A. 2). The availability of other methods for dealing with an unsatisfactory reservist is irrelevant. Activation of a reservist for unsatisfactory

---

[1]Petitioner's contentions that the appeal board failed to give the appeal meaningful consideration, and that it issued "canned" findings are without merit. The allegations, totally unsupported by facts are insufficient to overcome the presumption of regularity which must be accorded such proceedings.

performance is authorized by statute. 10 U.S.C. 673a. The determination as to what action should be taken to deal with an unsatisfactory reservist lies within the discretion of the military. See *e.g., Orloff* v. *Willoughby, supra; Keister* v. *Resor, supra; O'Mara* v. *Zebrowski, supra; Bluth* v. *Laird,* 435 F. 2d 1065 (C.A. 4); *Byrne* v. *Resor,* 412 F. 2d 774 (C.A. 3).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

CARLA A. HILLS,
Assistant Attorney General.

ROBERT E. KOPP,
BARBARA L. HERWIG,
Attorneys.

APRIL 1974.

DOJ-1974-04